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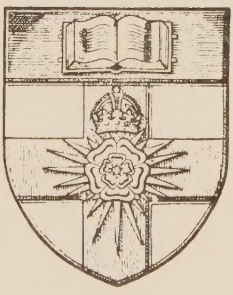

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re HORTON. LLOYD *v.* HATCHETT.

[1919. H. 740.]

EVE J.

1920

Mar. 17, 18, 19.

Will—Construction—Devise of Copyholds "now held by me"—Additional Description—After-acquired Copyholds—Contrary Intention—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24.

A testator who made his will in 1843 and died in 1872 devised all his copyhold hereditaments, being parcel of the manor of Lambeth, "now held by me as a customary tenant of the said manor, or otherwise," to trustees, upon trust to pay the rents, after the death of his wife, to his daughter for life, and after her death, in the events which had happened, to E. C. H., her heirs and assigns, according to the custom of the manor. The first defendant was her customary heir. At the date of his will the testator was possessed of one undivided moiety of the copyholds for a customary estate in fee simple. In 1848 he became possessed of the other undivided moiety of the same copyholds, and held the entirety at the date of his death. In 1873 the daughter, who was the customary heiress of the testator, was admitted tenant of the entirety for her life, and in 1891 she enfranchised and sold part of the copyholds:—

Held, that, apart from s. 24 of the Wills Act, the devise in the testator's will operated to pass the entirety of the copyholds, parcel of the manor

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of Lambeth, to which the testator was entitled at the time of his death; and that the same now belonged to the first defendant, together with the trust funds representing the proceeds of such of the copyholds as had been sold.

Held, further, that the testator had not expressed a contrary intention within the meaning of s. 24 of the Wills Act, the expression "now held by me" being mere additional description of the property and not an essential part of the description, cutting down the earlier part of the devise.

Cole v. *Scott* (1849), 1 Mac. & G. 518, distinguished.

ADJOURNED SUMMONS.

By his will, dated September 26, 1843, Thomas George Horton, of Gosport, in the county of Southampton, made the following devise: "I devise all my copyhold messuages, lands, tenements, and hereditaments, and parts and shares of copyhold messuages, lands, tenements and hereditaments, being parcel of the manor of Lambeth, in the county of Surrey, now held by me as a customary tenant of the said manor, or otherwise," to his wife, Elizabeth Catherine Horton, Elizabeth Frances Hall, and three other trustees therein named, their heirs and assigns, upon trust to receive the rents and profits thereof and pay them to his wife during her life, and after her death to pay the same to his daughter, Frederica Elizabeth Hatchett Blake, during her life, and after her decease then, in case she should leave any lawful issue her surviving, upon trust as therein mentioned, and in case his daughter should depart this life without leaving lawful issue her surviving, then upon trust to pay the rents and profits to his sister, Elizabeth Frances Hall, for her life, and after her death upon trust to surrender the said copyhold hereditaments and premises to her daughter, Elizabeth Catherine Hall, her heirs and assigns, for ever, according to the custom of the said manor.

At the date of his will T. G. Horton was possessed of and entitled to one undivided moiety of the copyhold hereditament therein described for a customary estate in fee simple, having been admitted thereto by the lord of the manor on August 19, 1843, on the surrender of his wife, Elizabeth Catherine Horton, the former tenant thereof.

In June, 1848, William Thomas Brande and Anna Frederica,

his wife, surrendered the other undivided moiety of the same copyhold premises to the lord of the manor to the use of T. G. Horton, and his heirs, and he was accordingly admitted thereto on June 9, 1848. Elizabeth Catherine Horton died on February 26, 1872, and T. G. Horton died on March 11, 1872, leaving his only child, Frederica Elizabeth Hatchett Blake, his heiress according to the custom of the said manor. On May 7, 1872, letters of administration of the estate of T. G. Horton with the will annexed were granted to Alfred Blake, the husband of Frederica Elizabeth Hatchett Blake, the surviving executors and trustees named in the will having renounced probate and disclaimed the trusts reposed in them.

On April 10, 1873, F. E. H. Blake was granted seisin of the entirety of the premises of which T. G. Horton died seised to hold for the term of her natural life at the will of the lord and according to the custom of the manor.

The testator's sister, Elizabeth Frances Hall, died in 1873, leaving her daughter, Elizabeth Catherine Hall, who married Edward Henry Hatchett and died intestate on November 22, 1884, having had four children of whom her youngest son, the first defendant, Frederick William Hatchett, was, by the custom of the manor, the heir of Elizabeth Catherine Hatchett. By an order dated August 27, 1890, made on the application of the testator's daughter as tenant for life in possession of the entirety of the copyholds, trustees were appointed under the settlement created by the will of the testator for the purposes of the Settled Land Act, 1882. In 1891 certain parts of the copyholds were enfranchised and sold by F. E. H. Blake, and the proceeds invested in 1000*l.* Registered War Bonds which, with a small sum of cash, were now under the control of the defendant, W. J. Lloyd, as the surviving trustee for the purposes of the Settled Land Act.

The details of this transaction and the other dealings with the copyholds sufficiently appear from the judgment of the Court.

By her will, dated August 3, 1901, F. E. H. Blake appointed, devised and bequeathed all her real and personal estate to the plaintiff, Agnes Blake, and the defendant, W. J. Lloyd,

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and the plaintiff, Charles Owen Lloyd, upon trust to sell and get in the same, and pay her debts, etc., and subject as therein stated to pay the residue of her estate to the then Roman Catholic Bishop of Southwark to be used by him for the benefit of the Roman Catholic poor in his diocese.

F. E. H. Blake died on February 2, 1918, without marrying again, and having had issue one child only, Charles Blake, who married the plaintiff A. Blake, and died in 1901, in the lifetime of his mother, without having had any issue.

The will with codicils of F. E. H. Blake were proved on July 23, 1918, by the plaintiffs, A. Blake and C. O. Lloyd, W. J. Lloyd having renounced probate. The last defendant, the Right Rev. Peter Emanuel Amigo, was the present Roman Catholic Bishop of the Roman Catholic diocese of Southwark.

On April 8, 1919, C. O. Lloyd and A. Blake, widow, as trustees of the will of F. E. H. Blake issued an originating summons for the determination of the questions : (1.) Whether, on the true construction of the will of T. G. Horton, the entirety of the copyhold hereditaments, parcel of the manor of Lambeth, to which he was entitled at the time of his death, passed by the devise in his said will contained, or whether only the undivided moiety to which he was entitled at the date of his will passed and he died intestate as to the other undivided moiety. (3.) Who was entitled to the trust funds in the hands or under the control of W. J. Lloyd as trustee under the settlement aforesaid representing the proceeds of sale of such of the copyhold hereditaments as were sold by F. E. H. Blake.

J. G. Wood, for the plaintiffs. The question now raised on this will is the true construction of the devise of the copyholds and whether a " contrary intention " has been expressed within the meaning of the Wills Act. I submit that the words " now held by me " in this devise are sufficient indication of a " contrary intention " within s. 24 of the Wills Act : *Lady Langdale* v. *Briggs*. (1) A strong case on this point is

(1) (1856) 8 D. M. & G. 391.

Cole v. *Scott* (1) where the word "now" was held to indicate a contrary intention. The word "now" means at a particular point of time. In *In re Champion* (2) there was a devise of a house and land "now in my own occupation," and land was subsequently acquired by the testator and occupied by him. North J. held that in the circumstances of that case those words were not a vital part of the description, but were additional, and that the subsequently acquired lands passed. But in the present case the words "now held by me as customary tenant of the manor" are a vital part of the devise, and not merely an additional description. Only one undivided half of the copyholds, therefore, passed to the first defendant, and the other half passed to Mrs. Blake as heiress-at-law of the testator and to those claiming through her. There is no case of estoppel against them.

Franey, for the Roman Catholic Bishop of Southwark, adopted the same arguments, and referred to *In re Edwards* (3); Jarman on Wills, 6th ed., pp. 416–418; and to *Douglas* v. *Douglas* (4), where *Cole* v. *Scott* (1) was commented on. *Wagstaff* v. *Wagstaff* (5), which might be relied upon by the other side, was a case of subsequently acquired personal estate.

Gover K.C. and *H. L. Fraser* for the first defendant. Quite apart from s. 24 of the Wills Act, on their true construction the words of this devise included the after-acquired copyholds of the manor of Lambeth. The devise is of copyholds "now held by me as a customary tenant . . . . or otherwise." The word "otherwise" cannot there mean held otherwise than as a customary tenant because there is no alternative manner of holding copyholds. The alternative is between "now held" and "otherwise," that is, at any other time, so that the devise expressly includes after-acquired copyholds. In any case the after-acquired moiety of the copyholds passes by virtue of s. 24 of the Wills Act: (*a*) because the adverbial expression "now" is, when unassisted by the context,

(1) 1 Mac. & G. 518.
(2) [1893] 1 Ch. 101.
(3) (1890) 63 L. T. 481.
(4) (1854) Kay, 400, 404.
(5) (1869) L. R. 8 Eq. 229.

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insufficient to show a contrary intention within the meaning of the section; and (*b*) because the expression "now held by me" is not an essential part of the description, and may, therefore, be disregarded. The operation of s. 24 of the Wills Act is confined to property, and has no application to persons: *Bullock* v. *Bennett* (1) and *Amyot* v. *Dwarris*. (2) The general principle upon which s. 24 is to be applied is stated by Cotton L.J. in *Everett* v. *Everett*. (3) Under it a will is to be construed as if it had been executed immediately before the testator's death, and the will is to speak and have effect as from that date. The mere use of words showing possession, or of the present tense, is not enough to show a contrary intention: *Lord Lilford* v. *Keck*. (4) In *Cole* v. *Scott* (5) the matter did not turn solely on the use of the word "now." There were other provisions to assist the view that a contrary intention was shown.

In any case that decision has been whittled down by later decisions, and if it is still to be followed at all it must be only on the special circumstances that existed there. This case is really covered by *Hepburn* v. *Skirving* (6); *Lady Langdale* v. *Briggs* (7); and by *Wagstaff* v. *Wagstaff* (8), which was followed by Swinfen Eady J. in *In re Ashburnham*. (9) Here there is amply sufficient to describe the copyholds without reference to the words "now held by me," which are merely an additional description and not essential.

In *In re Willis* (10) the devise was of a freehold house and premises with a full description, and the words "in which I now reside," which were added, were held to be additional description of the property and not a vital and essential part of it, and that lands bought after the date of the will passed by the devise.

George Henderson, for W. J. Lloyd.

J. G. Wood in reply.

(1) (1855) 7 D. M. & G. 283.
(2) [1904] A. C. 268.
(3) (1877) 7 Ch. D. 428.
(4) (1862) 30 Beav. 300.
(5) 1 Mac. & G. 518, 522.
(6) (1858) 4 Jur. (N. S.) 651.
(7) 8 D. M. & G. 391.
(8) L. R. 8 Eq. 229.
(9) (1912) 107 L. T. 601.
(10) [1911] 2 Ch. 563.

EVE J. The testator, Thomas George Horton, died on March 11, 1872, having made his will nearly thirty years previously, that is, on September 26, 1843. He thereby devised, in terms to which I shall have to revert by-and-by, certain copyhold messuages, lands, tenements and hereditaments, parcel of the manor of Lambeth, in the county of Surrey, to trustees upon trust to pay the rents and profits thereof to his wife during her life, and after her decease to his daughter Frederica E. H. Blake, then already a married woman, during her life, and after her decease upon the trusts therein mentioned.

The wife predeceased him by a few days, but his daughter survived all the persons beneficially interested under the testator's will after her death, and died on February 2, 1918. On her death the question was raised whether the construction put upon the testator's will and uniformly acted upon during the forty-six years which elapsed between his death and that of his daughter, was the correct construction, and it is to determine that question that this summons has been issued. The question is whether the devise in the testator's will passed his interest in the copyholds at the date of his decease, at which time he was tenant of the entirety, or whether it was limited to his interest at the date of his will, at which time he was tenant of a moiety only.

The former construction is the one which was always acted upon. In 1873 the daughter, Frederica, who, under the alternative construction would have been entitled to the undisposed of moiety as customary heiress of the testator, was admitted to the entirety for the term of her natural life. In 1890 she applied to the Court "in the matter of the real estate settled by the testator's will" and "in the matter of the Settled Land Act, 1882," for the appointment of trustees of the settlement created by the said will for the purposes of the said Act, as tenant for life in possession under the will of the entirety. In 1891 she enfranchised the entirety of a considerable part of the property having previously charged it in favour of a Mr. Sacks who advanced the monies required, for the enfranchisement, and later on in the same year she

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sold the property so enfranchised to J. C. and F. Field, Ld., and conveyed it to them as tenant for life under the will.

It is not suggested that these circumstances raise any case of estoppel against those claiming under Frederica but, it is argued, they are not to be wholly disregarded inasmuch as they involve transactions in the course of which the construction of the testator's will must have been considered, time and again, by persons competent to form an opinion on its true effect and meaning. To this Mr. Wood replies that this very question which I am now considering was raised on the purchase by the company, and was disposed of by Mrs. Blake including in the conveyance any interest she had in the premises as customary heiress of her father. These, however, are matters of history not affecting the true construction of the will to which I now return. The devise I have to construe is in these terms :—" I devise all my copyhold messuages, lands, tenements, and hereditaments, and parts and shares of copyhold messuages, lands, tenements, and hereditaments, being parcel of the manor of Lambeth, in the county of Surrey, now held by me as a customary tenant of the said manor or otherwise," unto trustees, upon the trusts there mentioned. The first question is, apart altogether from s. 24 of the Wills Act, does that devise extend to the whole of the testator's copyholds held of the manor, or is it limited to those of which he was customary tenant at the date of the will ? In other words, is the generality of the opening words cut down by the expression " now held by me as a customary tenant " ? Counsel on behalf of the first defendant, who insists that all the copyholds are included, relies on the words " or otherwise " which follow the words " now held by me as a customary tenant of the said manor," and argues that they cannot be read as referring to the immediate antecedent inasmuch as a man cannot hold copyholds otherwise than as a customary tenant. They must, therefore, be referable to something else and he suggests that the true effect of their introduction is to make the devise a devise of " all my copyholds, both those which I now possess and hold as a customary tenant of the said manor, and those which I

may at any time hereafter acquire and hold." Seeing that one cannot ignore the words and that, if possible, an intelligent and effective meaning must be attributed to them, I think the construction suggested is the right one, and that they have the effect of preventing the generality of the devise being controlled by the reference to the copyholds of which the testator was tenant at the date of the will. Accordingly, on the construction of the will—apart from any assistance afforded by the Wills Act—I hold that the devise operated to pass the entirety of the copyholds.

But if this construction be wrong, and the devise cannot be held to extend to all the copyholds of which the testator died possessed without recourse to s. 24 of the Wills Act, the question then arises whether the language used by the testator shows a contrary contention within the meaning of that section.

Mr. Wood and Mr. Franey, who argue that it does, rely mainly, if not entirely, on the presence of the adverb "now," and maintain that their case is governed by the decision in *Cole* v. *Scott* (1) and is expressly covered by the observations of Turner L.J. in *Lady Langdale* v. *Briggs* (2) where, commenting upon *Cole* v. *Scott* (1), he says: "It was argued, however, that a contrary intention does appear by this will, and the argument was put thus: that the words 'my leasehold, messuages, etc.' were equivalent to the words 'the leasehold, messuages, etc., I now possess' for which *Cochran* v. *Cochran* (3) was cited. And then *Cole* v. *Scott* (1) was referred to to show that the word 'now' was sufficient to indicate a contrary intention within the meaning of the Act. But I think that this argument was more subtle than sound. Upon the question of indicating a contrary intention, there is, as it seems to me, a substantial difference between gifts expressed in these terms: 'I give all my leasehold estates,' and 'I give all the leasehold estates I now possess.' The latter form of gift seems to me to indicate much more distinctly than the former that the testator

(1) 1 Mac. & G. 518. (2) 8 D. M. & G. 391, 437.
(3) (1844) 14 Sim. 248.

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intended to give only what he had at the time." Now, of course, those observations, like everything else which fell from Turner L.J., deserve the most respectful attention, but it must be noted that in addition to the introduction of the word "now" there is another change made in the phraseology of the second sentence. The first reads, "I give all my leasehold estates"; the second, "I give all the leasehold estates I now possess." In the present case I have no substitution of the definite article for the possessive pronoun, and I have not therefore to deal with the expression which the Lord Justice regarded as indicating more distinctly the testator's intention to give only what he had at the date of his will. A devise of "all my copyholds now held by me as a customary tenant of the said manor, or otherwise," is obviously open to a construction which could not properly be imposed on a devise of "all the copyholds now held by me as a customary tenant of the said manor," and I do not think the observations of the Lord Justice really assist me on this occasion. Further, the decision in *Cole* v. *Scott* (1) was arrived at upon a will from which the Court drew the conclusion that the testator had therein differentiated between gifts which he intended respectively to include or exclude after-acquired property, and that the word "now" had been deliberately employed by him to indicate gifts falling within the latter of the two classes. The case cannot be regarded as deciding that the simple use of the word "now," apart from context, or other indications in the will, must be treated as showing a contrary intention within the section. The question therefore is whether, by reason of any context, or any other of the provisions of this will, I ought to hold that the testator intended by the use of the word "now" to exclude the after-acquired interest from his devise. In this connection it is not unimportant to bear in mind what was said by the Court of Appeal in *Everett* v. *Everett* (2) by way of caution against cutting down the operation of s. 24. The cases appear to me to have established this, that neither the use of the possessive pronoun, nor of the present tense, nor

(1) 1 Mac. & G. 518. (2) 7 Ch. D. 428.

of the adverb " now," is sufficient, of itself, to show a contrary intention, though each may accurately be said to refer to a subject-matter existing at the date when the clause was penned. But the testator must be taken to know that his dispositions will be construed with reference to the property comprised in them as if his will had been executed immediately before his death, and the possessive pronoun, the present tense, and the adverb " now " being equally capable of being read as referring to the subject-matter then existing, they will in fact be so read unless he makes clear his intention that his will should, in these respects, be construed as on the date he made it. If he does not do so, the words and tense are regarded as referring to the condition of things existing immediately before the testator's death. In the will before me I can discover no context, or other indications from which I can conclude that the testator intended the word " now " to refer to any moment of time other than the moment immediately preceding his death, and I do not think the fact that it is used in conjunction with the possessive pronoun, and the present tense, makes any difference in this respect : *Wagstaff* v. *Wagstaff* (1) ; *Hepburn* v. *Skirving*. (2)

Moreover, in this case I do not think the words " now held by me as a customary tenant of the said manor " ought to be treated as an essential part of the description cutting down the earlier one of this devise. I think they ought to be treated as a mere additional description of the property. On these grounds I come to the conclusion that on the true construction of the will all the testator's interest in the copyholds passed under the devise, and, in the events which have happened, now belong to the first-named defendant.

Solicitors : *Kinch & Richardson*, for *Davis, Lloyds & Wilson. Newport, Monmouthshire ; T. C. Summerhays & Son ; Arnold, Chadwick, Fooks & Co.*

(1) L. R. 8 Eq. 229. (2) 4 Jur. (N. S.) 651.

G. M.

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March 30, 31.

In re BRAINTREE AND BOCKING GAS COMPANY, LIMITED.

[1920. B. 011.]

Company—Deed of Settlement—Alteration of Constitution—Substitution of Memorandum and Articles—No alteration of Objects—Special Resolution—Confirmation by Court—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* (1.); *s.* 2—*Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *ss.* 9, 264, *sub-ss.* (1.), (2.), (3.).

Where a company constituted by a deed of settlement has passed a special resolution to alter the form of its constitution by substituting a memorandum and articles for the deed of settlement, pursuant to s. 264 of the Companies (Consolidation) Act, 1908, the special resolution requires to be confirmed by the Court under s. 264, even if the memorandum does not make any change in the objects of the company.

PETITION.

This petition was presented on January 23, 1920, by the Braintree and Bocking Gas Co., Ld., in order to obtain the confirmation of the Court to the alteration of the form of the constitution of the company by substituting a memorandum and articles for a deed of settlement, pursuant to s. 264 of the Companies (Consolidation) Act, 1908, if and so far as the special resolution passed to give effect to such alteration was not fully operative according to its purport without such confirmation.

In 1849 certain persons had formed themselves into an association or company under the same title as that of the petitioners, for the purpose of supplying gas to the town of Braintree, in the county of Essex, and the adjacent parts. They entered into a deed of settlement, dated September 1, 1849, containing provisions thenceforth to regulate their association. As so constituted the company was registered under the Companies Consolidation Act 1844 (7 & 8 Vict. c. 110). In 1860 the company was re-registered under the provisions of the Joint Stock Companies Acts, 1856 and 1857, and Table B of the said Acts was substituted for the regulations of the company under the deed of settlement. In 1874 the company

obtained the Braintree and Bocking Gas Order, 1874, under which the company became undertakers for the supply of gas to Braintree and district. In 1914 the company was registered under the Companies (Consolidation) Act, 1908, but without any alteration in the form of its constitution.

The capital of the company was now 20,000*l*. The main objects of the company, as stated in the deed of settlement, were to make and supply gas or other illuminating power to the town of Braintree and the adjacent parts of Bocking, and to manufacture, sell, and dispose of coke and other residuum arising from the manufacture of gas, and to acquire and dispose of real and personal property. Para. 10 of the present petition set out the powers of the company under the provisional order. Para. 12 set out the following special resolution passed at an extraordinary general meeting of the company on November 26, 1919, and confirmed as a special resolution on December 17, 1919: "That the memorandum and articles of association contained in the printed document submitted to this meeting . . . . be and the same are hereby approved, and that such memorandum and articles of association are hereby substituted as the constitution of the company, pursuant to s. 264 of the Companies (Consolidation) Act, 1908, for the company's deed of settlement dated September 1, 1849."

Para. 13 set out a copy of the proposed memorandum of association, art. (3.), stating that the objects for which the company was established remained those stated in the deed of settlement, and in the Braintree and Bocking Gas Orders, 1874, and these objects were enumerated in sub-clauses (*a*) to (*h*) of art. (3.).

Para. 14 of the petition alleged that the memorandum of association did not contain any alteration or extension of the objects of the company as specified in the deed of settlement, and if and so far as it might be found to contain any such alteration or extension the company desired that such might be confirmed.

Para. 15 set out the reasons for the proposed alteration of the company's constitution. Other paragraphs stated that

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the financial position of the company was sound, the net profits for 1918 amounting to 439*3l.*; that the issued share capital of the company consisted of 1495 shares of 10*l.* each fully paid; and that the remaining 505 shares had not been issued.

Para. 22 alleged that no one would be prejudiced by the proposed alteration in the constitution of the company, and that it was just and equitable that the special resolution should be confirmed.

The petitioner therefore prayed:—

1. That it might be declared that the alteration in the form of the company's constitution, proposed to be effected by special resolution set forth in para. 12 of the petition, did not involve any alteration or extension of the objects of the company, and was fully operative without confirmation by the Court.

2. That the proposed alteration effected by the special resolution might be confirmed by the Court pursuant to s. 264 of the Companies (Consolidation) Act, 1908, if and so far as such resolution was not fully operative without such confirmation.

The petition was not served on anyone.

F. K. Archer for the petition. There is no alteration or extension of the objects of the company effected by the substitution of the proposed memorandum, but it states the objects in a more convenient and modern form. It is a question whether the mere alteration of the form of the company's constitution without any alteration of its objects requires the confirmation of the Court under s. 264 of the Act of 1908, having regard to the language of sub-s. (2.) of that section.

Cur. adv. vult.

March 31. EVE J. I am satisfied in this case that the substitution of the memorandum of association for the deed of settlement does not involve any alteration with respect to the objects of the company. In these circumstances the

question is raised whether the alteration in the form of the company's constitution is one which requires confirmation by the Court under s. 264 of the Act of 1908. It is submitted that sub-s. (2.) of that section, whereby it is enacted that "the provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall so far as applicable apply to an alteration under this section" . . . . only refers to an alteration in the constitution involving an alteration of objects, and that the introduction of the phrase "so far as applicable" excludes the application of the sub-section to a case where there is no alteration of objects. I cannot adopt this view. In the statute whereby the powers of altering the provisions of the memorandum with respect to the objects of the company and of altering the form of the constitution of the company by substituting a memorandum for a deed of settlement were first conferred—the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62)—the two powers are dealt with together in sub-s. (1.) of s. 1, and the concluding words of that sub-section provide that "in no case shall any such alteration take effect until confirmed on petition by the Court." That these words extend to cases where either power is exercised, and if it be the latter of the two powers, equally to cases which do not involve any alteration with respect to the objects is, I think, clear on the construction of the sub-section itself, but if not, the intention that confirmation by the Court shall be obtained in all cases is, I think, made manifest by the opening words of s. 2, which read as follows: "Where a company has altered the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, or has altered the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, and such alteration has been confirmed by the Court." . . . . It is to be observed that there is nothing said here indicative of an intention to limit confirmation of alterations in the form of the company's constitution to those involving also an alteration in respect of the objects; the two alternatives are alteration of the memorandum with respect to the objects, and alteration

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in the form of the company's constitution, and there is no sub-division of the latter class.

In my opinion, therefore, in a case like the present, confirmation by the Court was necessary under the Act of 1890.

In the Act of 1908, which is an Act to consolidate the Act of 1862 and the Acts amending it, and in which therefore changes in the law are not to be expected, the two powers conferred by the Act of 1890 are dealt with in separate parts of the Act; the power of altering the provisions of the memorandum with respect to the objects in s. 9, and the power of altering the form of the constitution by substituting a memorandum and articles for a deed of settlement in s. 264. It is provided by sub-s. 3 of the latter section that any alteration under the section may be made either with or without any alteration of the objects of the company. The section therefore deals expressly with alterations in the form of the constitution not involving any alteration with respect to the objects of the company. So approaching it, and giving full force to its opening words "subject to the provisions of this section," I think it is impossible to hold that the qualifying words in sub-s. (2.), "so far as applicable," have been introduced to exclude the necessity for confirmation in all cases where the alteration in the form of constitution is unaccompanied by an alteration in objects. I think they are completely satisfied by other considerations. In adjudicating upon a petition to confirm proposed alterations in objects it is open to the Court to confirm some and reject others, and to impose such terms and conditions as it thinks fit; and in exercising its discretion it is to have regard to the rights and interests mentioned in sub-s. (5.) of s. 9. It is obvious that some of these provisions are not equally applicable, or of equal importance in the case of a mere substitution of a memorandum for a deed of settlement, and the words "so far as applicable" were, in my opinion, introduced into sub-s. (2.) of s. 264 in order to enable the Court, in dealing with a petition under that section, to apply the provisions of s. 9, sub-ss. (3.), (4.) and (5.), so far only as they can properly be applied to conditions materially different from those subsisting in the case of a petition under s. 9.

The result is that I hold that the alteration to which this petition relates cannot take effect unless and until it is confirmed by the Court, and I make the order in the terms of para. 2 of the prayer, stopping at the end of the reference to the Act of 1908.

Solicitors: *A. F. Church & Son.*

G. M.

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[1919. P. 206.]

Landlord and Tenant—Buildings and Fixtures erected and affixed by Tenant during the Term—Covenant to deliver up—Right of Removal—Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *s.* 21—*Covenant inconsistent with Statutory Provisions—Right of contracting out.*

The Agricultural Holdings Act, 1908, contains no prohibition against the parties to a lease or tenancy contracting themselves out of the provisions of s. 21 of the Act, and it is therefore competent to them to do so.

Mears v. *Callender* [1901] 2 Ch. 388 applied.

A lease of a farm contained a covenant by the lessee to deliver up at the end of the term all the demised premises and all new and other buildings and erections thereon and all such fixtures as were in anywise affixed or fastened to the freehold of the premises:—

Held, that the covenant effectually excluded the provisions of s. 21 of the Act, and the tenant was not entitled to remove certain buildings and fixtures erected and affixed by him during the term.

TRIAL OF ACTION with witnesses.

This was an action by the plaintiffs for a declaration that under the provisions of s. 21 of the Agricultural Holdings Act, 1908, certain buildings and fixtures erected and affixed by them while in occupation of the defendant's farm were the property of, and removable by, the plaintiffs.

In December, 1906, the plaintiffs took an assignment of a twenty-one years' lease of the farm in question, and

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subsequently made various alterations consisting of the addition of fixtures and the erection of buildings, in respect of which they were admittedly not entitled to claim compensation under the Act, but some of which came within the description of buildings and fixtures in s. 21 which, prima facie, a tenant is entitled to remove.

The lease, dated October 2, 1897, was for a term of twenty-one years from September 29, 1897, and previously to the determination thereof the plaintiffs gave notice under s. 21 to the defendant, the owner of the freehold reversion, that they intended to remove the buildings and fixtures in question, but the defendant did not elect to purchase the same, and refused to allow the plaintiffs to remove them. The plaintiffs then commenced this action.

The material covenants on the part of the lessee contained in the lease were: (1.) to keep in repair the farmhouse and buildings originally demised and any new buildings erected on the demised premises during the term; (2.) to paint outside and tar, in every third year, the outside parts of the farmhouse and all other buildings on the said premises "as have been heretofore" painted or tarred; (3.) to paint in every seventh year all such parts of the inside of the farmhouse and other buildings "as have been hitherto or ought to be" painted; and (4.) to leave, surrender and yield up to the lessor at the end or sooner determination of the term "all and singular the said demised premises together with all new and other buildings and erections thereon being so well and sufficiently repaired supported maintained . . . . painted, tarred and kept and all such fixtures as are in anywise affixed or fastened to the freehold of the said premises and as between landlords and tenants are usually considered the property of the landlord and particularly the landlord's fixtures and things in and upon the said premises." The covenants in question are more particularly set out in the following judgment.

Roby K.C. and *W. M. Walker* (*Rayner Goddard* with them) for the plaintiffs. The plaintiffs' claim is under s. 21 of the

Agricultural Holdings Act, 1908, which corresponds with s. 34 of the Agricultural Holdings (England) Act, 1883. In the present lease there is no reference to the Act of 1883 and nothing in the covenant to exclude the statutory right given to the plaintiffs. The landlord must exclude the provisions of the Act in express terms, if they are not to apply, and the covenant to deliver up in the present lease is not sufficient for that purpose, but only applies to such buildings and fixtures as the tenant has, apart from the Act, no right to remove. A lease should not be "construed so as to take away the ordinary legal right of a tenant to remove trade chattels unless such an intention is clearly expressed": per Turner L.J. in *Duke of Beaufort* v. *Bates* (1); and "if the language used leaves the matter doubtful, the ordinary right of the tenant to remove trade fixtures will not be affected": *Lambourn* v. *McLellan*. (2) There is no covenant to paint new buildings in this lease, and the covenant to paint does not extend to buildings which the tenant would have a right to remove, and the covenant to deliver up must be read and its meaning restricted accordingly.

Hughes K.C. and *Stafford Crossman* for the defendant. Neither the Act of 1883 nor the Act of 1908 operates to affect the terms of the lease except in cases expressly stated. Sect. 5 of the Act of 1908, corresponding with s. 55 of the Act of 1883, and s. 26 of the later Act prohibit contracting out in respect of questions of compensation and freedom of cropping and disposal of produce, but s. 21 contains no such prohibition and only applies where the contract of tenancy contains nothing to the contrary.

Mears v. *Callender* (3) shows that the operation of clause 34 of the earlier Act could be lawfully excluded by the contract between the parties, and that decision would apply equally well in this case: Woodfall's Landlord and Tenant, 19th ed., p. 751; Foà's Landlord and Tenant, 5th ed., p. 686; Dixon's Law of the Farm, 6th ed., p. 539. Upon the construction of the covenants we submit that it is clear that if new buildings

(1) (1862) 3 D. F. & J. 381, 390. (2) [1903] 2 Ch. 268, 277.
(3) [1901] 2 Ch. 388.

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are erected they come within the covenant to deliver up, and cannot be removed under s. 21.

Roby K.C. in reply.

PETERSON J. stated the facts and the provisions of s. 21 of the Agricultural Holdings Act, 1908, and continued: The question in this action depends ultimately upon the joint effect of s. 21 of the Agricultural Holdings Act, 1908, and the lease. The buildings and fixtures which the plaintiffs erected are admittedly not buildings or fixtures in respect of which the tenants are entitled to compensation under the earlier sections of the Act, and it is equally true that none of them was "affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord," within the exception in sub-s. 1 of s. 21.

Although there may be some doubt as to one or two of the items in respect of which the claim is made, there is no doubt that there are buildings or fixtures which come within the description of s. 21 of the Act of 1908, and which, prima facie, the tenant was entitled to remove. But the question arises whether in the lease there is not a prohibition against removal or, in other words, whether there is not in the lease a contract on the part of the tenant that s. 21 of the Act of 1908, or s. 34, the corresponding section of the Act of 1883, shall be excluded. Sect. 5 of the Act of 1908, which corresponds with s. 55 of the Act of 1883, provides that "subject to the foregoing provisions of this Act, any contract (whether under seal or not) made by a tenant of a holding, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement comprised in the first schedule hereto, shall be void so far as it deprives him of that right." Sect. 5 obviously does not apply to the present case, inasmuch as s. 21 is a section under which there is a power of removal and is not a section under which there is any right to claim compensation. Sect. 26 of the Act of 1908 contains provisions for freedom of cropping and disposal of produce "notwithstanding the provisions of any contract of tenancy or agreement." There again there is an express

provision excluding the possibility of a tenant contracting himself out of the section. Those therefore are two cases in which there is an express provision against the tenant contracting himself out of the Act, but there is no express provision preventing him from contracting himself out of s. 21. Indeed if he were unable to do so, you might have the result that if the tenant had put in fencing after the lease had been entered into and, having done so, agreed for some valuable consideration with the landlord that it was not to be removed at the end of the tenancy, but was to belong to the landlord, then the fencing would by virtue of s. 21 remain the property of the tenant, and could be removed by him. That appears to me to be an impossible construction to put upon the Act, and the view I have taken is confirmed by *Mears* v. *Callender* (1), where Cozens-Hardy J. in dealing with the corresponding section of the Act of 1883 says: "The attempt in the lease to exclude the Act of 1883"—the attempt being an express provision that the Act of 1883 should not apply to the contract of tenancy—"succeeds as to s. 34, which is not hit by s. 55." Those two sections correspond to ss. 21 and 5 of the Act of 1908. I therefore come to the conclusion that the provisions of s. 21 of the Act of 1908 may be excluded by the contract of tenancy.

That brings me to the lease. The lease demises the farm and lands "together with the farmhouse and other buildings about to be erected and built thereon and intended to be comprised in this demise"—apparently, there were some buildings about to be erected by the landlord which were intended to be comprised in the demise—"and which farm lands and premises hereby demised are more particularly delineated upon the plan endorsed on these presents and—therein coloured blue,"—the plan shows a farmhouse and buildings in the north-west corner. Then come the covenants. The repairing covenant is as follows, "and also shall and will from time to time and at all times during the continuance of the said term repair and restore and at his

(1) [1901] 2 Ch. 388, 398.

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own costs and charges well and sufficiently keep in repair and support maintain scour cleanse and keep the said farmhouse and all other buildings and edifices hereby demised and all the bridges gates fences hedges ditches pales and rails and other the appurtenances to the said farm buildings and lands belonging and any new buildings which may be erected upon the said premises when and as often as need or occasion shall require." There is, therefore, an obligation on the part of the lessee to keep in repair not only the original farmhouse and buildings referred to in the demise but also any new buildings erected on the premises at any time during the term either by the tenant or by the landlord. There is a further covenant by the lessee to paint in every third year "the outside parts of the said farmhouse and all other buildings on the said premises as have been heretofore painted." That covenant having regard to the words "heretofore painted" probably applies only to buildings existing at the time when the lease was entered into, and the like observation applies to the following covenant to tar "such other parts of the said buildings as have been heretofore tarred." Then follows a covenant to paint paper whitewash colour and varnish forthwith and once in every seventh year "all such parts of the inside of the said farmhouse and other buildings as have been hitherto or ought to be painted papered whitewashed coloured and varnished"—that covenant applies to the new as well as to the old buildings—"and all and singular the said demised premises together with all new and other buildings and erections thereon being so well and sufficiently repaired supported maintained and amended scoured cleansed painted tarred and kept and all such fixtures as are in anywise affixed or fastened to the freehold of the said premises and as between landlords and tenants are usually considered the property of the landlord and particularly the landlord's fixtures and things in and upon the said premises shall and will at the end or other sooner determination of the said term hereby granted peaceably leave surrender and yield up unto the lessors." The covenant to deliver up at

the end of the tenancy relates to the demised premises and all new or other buildings or erections thereon and, in addition, to such fixtures as are properly considered to be landlord's fixtures. So far as fixtures are concerned the covenant may be only to deliver up landlord's fixtures; but the covenant also provides that all new and other buildings shall be delivered up. The buildings now in question come under the words "all new and other buildings and erections," and they therefore come within the covenant to deliver up at the end of the term. Can it be said that this is a provision which does not exclude the operation of s. 21 of the Act of 1908? That section declares that any buildings erected for which the tenant is not, under the Act or otherwise, entitled to compensation and which otherwise come within the provisions of the section shall be the property of and removable by the tenant before or within a reasonable time after the determination of the tenancy; but the covenant in this lease says that the lessee shall not remove them but shall deliver them up.

In my opinion the covenant is in direct opposition to the terms of the section, and as it was open to the parties to contract themselves out of the operation of s. 21, I am of opinion that they did in fact do so. The action therefore fails, and must be dismissed with costs.

Solicitors: *Ernest Bevir & Son; Evans, Rendall & Oakeshott.*

R. M.

Followed. ALEXANDER MOUNTAIN & CO. *v.* RUMERE, LTD. [1948] 2 All E.R. 144.

Distinguished. ALEXANDER MOUNTAIN & CO. *v.* RUMERE, LTD. [1948] 2 All E.R. 482.

RUSSELL J.

1920

April 14.

TETLOW *v.* ORELA, LIMITED.

[1919 T. 681.]

Practice—Parties—Plaintiff dead at Date of Writ—Substitution—Rules of Supreme Court, Order XVI., *rr.* 2, 11.

Where an action is commenced in the name of a dead man his representative cannot be substituted as plaintiff.

The practice is the same as before the Rules of Supreme Court, 1883, came into force.

Clay v. *Oxford* (1866) L. R. 2 Ex. 54, under the Common Law Procedure Act, 1852, followed.

ON July 15, 1919, the writ was issued, in the name of Joseph Tetlow as plaintiff, asking for an injunction to restrain the defendants from passing off their toilet powder as the plaintiff's and infringing the plaintiff's trade mark. A statement of claim was delivered, alleging that the plaintiff carried on business as a manufacturer of toilet powder in the United States and that he and his predecessors in business had for many years sold the same in the United Kingdom in coloured boxes with a distinctive mark. A defence was delivered, and the action pursued a normal course till, in November, it was discovered that the plaintiff had been dead nearly eight years at the date of the writ, having by his will given the business to his wife, Ida J. Tetlow, whom he appointed executrix, and who had since carried on the business. The writ had been issued in the mistaken belief that Joseph Tetlow was alive, and the widow now applied that she might be substituted as plaintiff.

Hildyard K.C. for the applicant. There is jurisdiction to make the order, under r. 2 of Order XVI. (1) "An action"

(1) Rules of Supreme Court, 1883, Order XVI., r. 2: "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

has been commenced in the name of "the wrong person." It may also be said that here "it is doubtful whether it has been commenced in the name of the right plaintiff." In *Clay* v. *Oxford* (1) it was held that the representatives of a plaintiff dead when the writ was issued could not be substituted, but that was a case under the Common Law Procedure Act, 1852, the special language of which is not reproduced in the rules. The learned editor of the Yearly Practice, 1920, is right in his view (p. 158) that what could not then be done can now be. At any rate, reading rr. 2 and 11 together, it can be.

Clauson K.C. and *P. S. Stokes* for the defendants. "Wrong person" is not a person not living. Rule 2 does not apply. It contemplates substituting a living person for a living person. It authorizes substitution or addition, not creation. Rule 11 adds nothing to r. 2. There is no "matter in controversy," because there are not two parties. The framers of the rules had the decision in *Clay* v. *Oxford* (1) before them, and did not think fit to introduce a rule to alter the practice as there laid down.

RUSSELL J., after stating the facts. If I am justified by the rules in acceding to this application, I ought to accede to it. What was done was a pure slip. Can I substitute the applicant as plaintiff? It is a question of some difficulty. Unless this is a case which comes within the rules, I have no power to substitute the applicant. Before I consider the rules I will refer to the position as it existed under the Common Law Procedure Act, 1852, and the decision in *Clay* v. *Oxford* (1). Sect. 34 of the Common Law Procedure Act, 1852, deals with joinder of parties to actions and provides that non-joinder and mis-joinder of plaintiffs may be amended before trial. [His Lordship read s. 34.] Sect. 35 contains provisions which are much the same, for amendment of non-joinder and mis-joinder of plaintiffs at the trial, the consent of the parties to be added or struck out being required as before. Then s. 222 provides

(1) L. R. 2 Ex. 54.

RUSSELL J. 1920 TETLOW v. ORELA.

for amendment to prevent failure of justice by reason of mistakes and objections of form. [His Lordship read s. 222.] The case of *Clay* v. *Oxford* (1) arose under ss. 34 and 222. The headnote is: "Where an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs." There, the action was commenced on May 10, in the name of John Clay, as plaintiff. It was afterwards discovered that John Clay had died before the date of the writ, and on June 14 a summons was taken out to substitute the names of his executrix and executor as plaintiffs. That summons was abandoned; but on November 7 another summons to the same effect was taken out and Martin B. made the order prayed. A rule nisi to rescind that order having been obtained, the matter was argued. The Court, consisting of Kelly C.B., Bramwell B., Channell B. and Pigott B., was unanimous in rescinding the order. [His Lordship read the judgments.] Thus under the Common Law Procedure Act, 1852, there was no power to substitute as plaintiffs the representatives of a man who was dead when an action was commenced in his name, either under the special provisions of the Act or under the general words of s. 222. In that condition of things the present rules were framed, and the question is whether they allow that which the Act of 1852 did not allow. I do not think they do, and it would be straining the rules to hold otherwise. The rules relied on are rr. 2 and 11 of Order XVI. [His Lordship read r. 2.] In my opinion that rule means that, where an action has been commenced between two living parties by a living plaintiff, and the living plaintiff afterwards turns out to be the wrong person, an application may be made to the Court, and the Court can substitute another person for the living plaintiff or may add another person as co-plaintiff as the case may be. But it does not justify the Court in creating a plaintiff in an action for the first time. Then, r. 11 relates to mis-joinder and non-joinder of parties. It begins by providing that "no cause or matter shall be defeated by reason of the mis-joinder or non-joinder of parties, and the

(1) L. R. 2 Ex. 54.

Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." It so far contemplates only causes or matters having living persons as parties actually before the Court. It then goes on: "The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." In my opinion the names of "parties improperly joined" and the names of "parties who ought to have been joined" are, within the meaning of that rule, the names of living persons. I do not think, therefore, that r. 11 carries us any further.

The result is that I feel myself bound to refuse the present application.

Solicitors: *Janson, Cobb, Pearson & Co.; Dod, Longstaffe & Fenwick.*

A. L.

ASTBURY J.
1920
April 22.

In re WILSON AND SCOTTISH INSURANCE CORPORATION, LIMITED.

Insurance—Fire—Motor Car—Proposal—Statement of present Value—Insurance of full Value—Renewal of Policy—Implied Restatement of Value—Prior or subsequent Increase—Total Loss—Liability of Insurers.

The renewal of a fire policy is impliedly made on the basis that the statements in the original proposal are still accurate.

Observation of Cresswell J. in *Pim* v. *Reid* (1843) 6 Man. & G. 1, 25 applied.

On November 8, 1915, a motor car was insured for its full value on a proposal stating the present value at 250*l.* The policy was renewed in November 1916, 1917 and 1918, and the car was destroyed by fire on June 17, 1919, at which date the arbitrator found it was worth 400*l.* and stated a special case for the Court to determine the insurer's liability :—

Held, that if the increase in value had wholly accrued since the date of the last renewal, the insured was entitled to recover 400*l.*, but if it had partly accrued before that date he could only recover 250*l.*, and the case must accordingly go back to the arbitrator with this intimation.

SPECIAL CASE.

On November 8, 1915, Wilson bought a new Studebaker motor car for 250*l.*, and on the same day he signed a proposal form to insure it with the Scottish Insurance Corporation, Ld., against various risks including "damage to or loss of car (up to full value)," filling in the particulars required including "Horse Power Treasury Rating 20," "Price paid by proposer 250*l.*," "Date of purchase, November 8, 1915," and "Proposer's estimate of present value, 250*l.*"

Under the table of rates for insuring "full value of car including tyres lamps and accessories" the premium for a 200*l.* 20 h.p. car was 9*l.* 12*s.* 6*d.*; for a 300*l.* car 10*l.* 10*s.*; and for a 400*l.* car 11*l.* A car exceeding a scheduled value by not more than 50*l.* was rated at the mean premium, but a car in excess of that value was rated at the next higher premium. The rate for 250*l.* was therefore 10*l.* 1*s.* 3*d.*

There was however a special provision that "Cars not exceeding 25 h.p. (Treasury Rating) the maker's catalogue price of which was not more than 200*l.* without accessories, or 250*l.* with accessories, can be accepted at a premium

of 8*l.* 15*s.* 0*d.*" and this was the premium adopted and paid.

By the policy dated November 27, 1915, issued in consideration of the statements in this proposal which statements were thereby made a part of the contract and in consideration of the premium of 8*l.* 15*s.* 0*d.*, the Corporation undertook to indemnify the insured at any time within twelve months beginning at noon on November 8, 1915, or during the continuance of the policy, inter alia, clause 3: "against damage by fire or explosion or self-ignition of any motor vehicle belonging to the insured and described in the schedule hereto to an amount not exceeding the full value of the car, such sum to include loss or damage to accessories on or usually carried with such motor vehicle." The policy was headed "Premium due November 8." The schedule contained the same particulars as in the proposal.

Condition 9 provided that: "This policy may be renewed from year to year by payment of an annual premium. Fourteen days of grace are allowed for payment of the renewal premium, unless notice of intention to discontinue shall have been given on either side. No renewal receipt is valid unless it is in the official form, and no alteration or endorsement of this policy will be held valid unless the same is recognised and countersigned at the chief office. The directors shall not be bound to send any notice of the renewal premium becoming due, and shall be at liberty to decline to renew the policy at the end of any year. Further, the Corporation shall be at liberty at any time, by giving notice in writing to the insured by registered letter, to cancel this policy without assigning any reason, but without prejudice to the rights of the insured in respect of prior accident or loss, provided that the Corporation shall, in the event of such cancelment, refund the unexpired portion of the premium, and such notice shall be deemed sufficiently given if posted addressed to the insured at the within-mentioned address, or as altered by the intaimtion of the insured, and shall in such case be deemed to have been received by him at the time when the same would be delivered in the ordinary course of post."

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Condition 10 provided that questions as to liability or amount of compensation should be referred to arbitration.

The renewal premium of 8*l.* 15*s.* 0*d.* was duly paid and accepted in November, 1916, 1917 and 1918; and on June 17, 1919, the car was totally destroyed by fire at a garage.

The insured claimed 500*l.* as the then full value of the car. The Corporation contended that their liability was limited to 250*l.*, the estimated value stated in the proposal and policy, and this liability they admitted.

The matter was referred to arbitration and on December 31, 1919, the arbitrator having found as a fact that the full value of the car inclusive of accessories at the date of its destruction was 400*l.*, made his award in the form of a special case for the opinion of the Court on the question whether "the full value of the car" was to be limited to 250*l.* If, as in his own view, it was so limited he awarded the insured 250*l.* and ordered him to pay the costs of the arbitration and award. If not so limited he awarded him 400*l.* and the costs of the arbitration and award.

The special case was filed on March 10, 1920.

R. M. Pattisson for the insured. Clause 3 of the policy is perfectly clear. The Corporation insured the car up to its full value. If, as in the ordinary course, its value had depreciated they would only have been liable for the actual value. Owing to the abnormal state of the trade its value has appreciated beyond the original estimated value. But there is nothing in the proposal or the policy to fix that estimated value as the limit of liability. The Corporation took the risk. They knew the state of the trade, and could have declined to renew, or could at any moment have cancelled the policy under condition 9.

Herbert D. Samuels for the Corporation. First, on the construction of the policy the full value insured in clause 3 means the 250*l.* estimated value. The insured would of course have to prove the actual value at the date of the loss up to but not exceeding that amount. Beyond 250*l.* he is his own insurer.

Secondly, this is a policy requiring renewal every year. Each renewal is a fresh insurance reincorporating the original statements in the proposal and made on the basis of their continued accuracy at the date of renewal: Macgillivray on Insurance, p. 298; *Pim* v. *Reid*. (1)

At the last renewal on November 8, 1918, the insured must be taken to have stated that his estimate of present value was 250*l*. If it was over that amount a higher premium would have been payable, e.g., if it was 400*l*. the premium would have been 11*l*. In these circumstances the Corporation cannot admit any liability beyond 250*l*.

Pattisson in reply. The car was accepted at the special rate based on the maker's catalogue price, and the renewal was on the same basis. The dictum in *Pim* v. *Reid* (1) cannot apply to a mere increase in value of this nature.

The policy is admittedly valid, and the only question is quantum. That is a pure question of construction.

ASTBURY J., after stating the facts. The question is whether the insured's indemnity is limited to 250*l*. or whether he is entitled to recover the full value of the car. There is no decision directly applicable, but I cannot help thinking that on renewing the policy on November 8, 1918, the insured must be deemed to have continued or repeated his "estimate of present value" at 250*l*.

The actual decision in *Pim* v. *Reid* (1) is not in point, but Cresswell J. said: "No fresh proposal appears, therefore, to be expressly required on either side at the end of the first year; but it may then be very material for the company to know of any change in the extent of the risk, to enable them to determine whether or not they will continue the insurance."

In the present case it is clear that the insured obtained his policy on a proposal stating the estimated value at 250*l*. It is true he said "present value." But it is equally clear that if on a subsequent renewal he had informed the Corporation

(1) 6 Man. & G. 1, 25.

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that the value was 400*l.*, the premium would have been increased, or the renewal refused.

Now there is no evidence of the value at the last renewal on November 8, 1918, and it is therefore impossible to determine whether the insured is entitled to more than 250*l.* on the footing that the increase in value has wholly accrued since that date. Probably it had partly increased before then.

The case must therefore go back to the arbitrator to determine whether the increase in value has wholly accrued since the date of the last renewal. If so the insured is entitled to recover the full value, 400*l.*, and the costs of the arbitration, award and this hearing. If, on the other hand, the increase had partly accrued before that date so that the car was worth more than 250*l.* at the last renewal the insured can only recover 250*l.* and must pay the above costs. The case will go back to the arbitrator with this intimation.

Solicitors: *King, Wigg & Brightman, for Proud, Robinson & Roddam, Bishop Auckland; William Charles Crocker, for Millons & Newcombe, Newcastle-upon-Tyne.*

G. R. A.

MORYOSEPH *v.* MORYOSEPH.

SARGANT J.

1920

April 16.

[1868. M. 103.]

Will—Absolute Devise—Subsequent Settlement of Property devised—Failure of Trusts of Settlement—Absolute Gift prevails.

When real estate is given absolutely and the absolute gift is then modified by the settlement of the property upon trusts, the absolute gift prevails to the extent to which those trusts are not exhaustive.

The rule in *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551 applied to realty.

ADJOURNED SUMMONS.

By his will dated July 23, 1867, the testator Judah Moryoseph gave devised and bequeathed to trustees all the real and personal estate (not thereinafter specifically bequeathed) to hold the same upon the several trusts interests and purposes thereinafter declared, that is to say, as to No. 18, Gun Square, Houndsditch, he directed his trustees to receive the rents and profits and to pay the same to his daughter Deborah during her life for her separate use and after her decease he gave and devised the same unto and amongst her children living at her death but if she left no child or children her surviving devised the same unto and amongst all and every his own child or children living at her decease absolutely as tenants in common. Then as to the sum of 1000*l.* consolidated annuities the testator directed his trustees to receive the dividends and annual produce thereof and to pay the same to his daughter Deborah during her life for her separate use and after her decease to divide the same amongst her children living at her death but in the event of her leaving no child living at her death bequeathed the same between and amongst all his own children living at her death. The testator proceeded to make various other gifts, and then as to the rest, residue and remainder of his real and personal estate and effects, gave, devised and bequeathed the same and every part thereof unto and amongst all and every his sons and daughters named in his will their heirs and assigns share and share alike as tenants in common, but he directed that the share or shares of any or either of his daughters should "be settled

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upon them at the discretion of my trustees . . . . for their sole and separate use and in accordance with my previous directions as to the legacies hereinbefore bequeathed to my said two daughters Deborah and Simcha."

The testator died on July 27, 1867, and on February 18, 1869, an order was made for the administration of his real and personal estate. His daughter Deborah married Joshua Lang in July, 1868, and had one child only, who was born in July, 1874, and died on June 6, 1917. Deborah died on May 1, 1919, having survived all her four brothers and sisters.

It followed that on the death of Deborah, No. 18, Gun Street, fell into residue, and this summons, which was taken out in the administration action on December 5, 1919, raised the question whether according to the true construction of the testator's will and in the events which had happened the testator died intestate as to the one-fifth share or interest of or in the house given by the residuary gift to Deborah and directed to be settled or who was then entitled to such one-fifth share.

Manning K.C. for persons representing the testator's heir at law. The trusts upon which the daughter Deborah's fifth share of residue were directed to be settled have failed, and accordingly in so far as the residue consisted of realty there is an intestacy. The Court on a previous occasion decided that the rule in *Lassence* v. *Tierney* (1) applied so far as the residue consisted of personalty, with the result that Deborah took an absolute interest in it. But this rule has never been applied to realty. Thus in *Lassence* v. *Tierney* (1) it was only applied to the personalty, although there was also realty involved in that case. Also in the text-books the rule is always stated in chapters relating to personalty only: Theobald on Wills, 7th ed., chap. 39, p. 476; Jarman on Wills, 6th ed., vol ii., chap. 33, pp. 1182, 1183. It is difficult to explain why there should be such a distinction between realty and personalty except that in early times the Court always had a special tenderness for heirs at law and would not be ready to apply a rule that would prevent their taking.

(1) 1 Mac. & G. 551.

[SARGANT J. In *Lassence* v. *Tierney* (1) the question could not arise as to the real estate because the deed of settlement under which Mrs. Lassence's power to appoint it by will arose had never been acknowledged by her.]

In no case has it ever been decided that the rule applies to realty. It is suggested that the distinction is due to the special nature of estates in land.

Dighton Pollock for the personal representatives of Deborah Lang. There is no reason why the rule should not be just as applicable to real estate as to personalty, and *Yarrow* v. *Knightly* (2), though not perhaps a direct authority, points in that direction. It is a case that rests strictly on the rule that when there is an absolute gift of real estate followed by a gift over upon a contingency, the absolute gift is left untouched save to the extent necessary to admit the contingent gift, so that if the contingency does not happen the absolute gift prevails.

That rule and the rule in *Lassence* v. *Tierney* (1) and *Hancock* v. *Watson* (3) are really based on the same principle, and are so closely related that in Jarman on Wills, 6th ed., vol. ii., p. 1435, the author. after stating and discussing the former rule, goes on in the same chapter at p. 1459 to refer to the rule in *Lassence* v. *Tierney*. (1)

[He also referred to *In re Sidway Hall Estate*. (4)]

Israel for the trustees.

SARGANT J. The question arising on this summons is whether the rule laid down in *Lassence* v. *Tierney* (1) and *Hancock* v. *Watson* (3) applies to real as well as personal estate, and I am surprised to find that it is still a subsisting question. [His Lordship stated the material parts of the testator's will and continued :] The testator's daughter Deborah has recently died, having survived her only child and all her brothers and sisters named in the will. The specific devise of 18, Gun Square, therefore failed, and the house in question fell into residue. The consequence is that the ultimate remainder in the house went as to one-fifth part to Deborah as forming

(1) 1 Mac. & G. 551.
(2) (1878) 8 Ch. D. 736.
(3) [1902] A. C. 14.
(4) (1877) 37 L. T. 457.

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part of the residue and became settled under the provisions settling her share in residue, in accordance with the testator's directions as to the legacy of 1000*l.* Consols. It is not disposed of under that settlement inasmuch as the trusts of the sum of 1,000*l.* Consols have been exhausted without there being anyone entitled to receive the ultimate interest in it. There was an administration action in connection with the testator's estate, and certain funds were paid into Court in the action. Recently on a petition for payment out of these funds which came before me I came to the conclusion as to the destination of Deborah's legacy and her share of residue so far as it was personalty that the rule in *Hancock* v. *Watson* (1) applied, and that the absolute interest therein given to Deborah in the first instance under the will was not disturbed by the direction to settle save so far as that direction extended. The result was that the ultimate interest in the share of residue given to the daughter Deborah vested so far as it was personalty in her and passed to her legal personal representative, I have now to decide whether the same rule applies to her fifth share in the house.

It is suggested that *Lassence* v. *Tierney* (2) was only decided in connection with personalty, and that the rule laid down by it is stated in the text-books as if it were limited to personalty. It is true that the main principle of the decision in *Lassence* v. *Tierney* (2) deals only with settled personalty, but this is sufficiently explained by the absence of an acknowledgment by Mrs. Lassence, a married woman, of a certain deed of settlement. This was fatal to the claim by her husband to take the realty comprised in that settlement under her will against the heir at law, as her power to appoint the property by will was dependent on the validity of the settlement. But the reasoning on which the judgments in *Lassence* v. *Tierney* (2) and *Hancock* v. *Watson* (1) were founded appears to me to be as applicable to realty as to personalty. These decisions were arrived at on grounds of general application. Where property is settled under a will by way of a series of positive original trusts, and those trusts are not exhaustive, there is nothing

(1) [1902] A. C. 14. (2) 1 Mac. & G. 551.

to take away from the testator's estate any interest in the property left undisposed of by those trusts. But where property is given absolutely in the first instance so as to segregate it from the estate of the testator and then this absolute gift is modified by the settlement of the property upon trusts, then to the extent to which those limiting trusts are not exhaustive the original absolute gift prevails. The distinction is between positive and negative trusts. To the extent that positive trusts are not exhaustive there is an intestacy: to the extent that negative or limiting trusts are not exhaustive a prior positive gift is left unaffected.

It is now for the first time suggested that there is a difference in this connection between real and personal estate. In my opinion there is no real basis for this suggestion. In Jarman on Wills, 6th ed., pp. 1456 to 1458, the learned author seems to regard the rule relating to personalty as having originated by way of analogy to a previously existing rule as to realty. Certainly he treats the rule that an absolute gift of realty is not displaced by subsequent contingent or partial gifts save so far as necessary to satisfy those contingent or partial gifts as a rule based on the same principle.

The industry of counsel has not been able to discover any case in which it is clearly laid down that the rule of *Lassence* v. *Tierney* (1) applies to real estate, but *Yarrow* v. *Knightly* (2) goes some small way in that direction. For myself I think it would be very unreasonable to introduce a new distinction of the kind suggested between real and personal estate out of tenderness to heirs at law, especially when to do so would be in defiance of reasoning equally applicable to real and personal estate.

There must be a declaration that a one-fifth share or interest of or in No. 18, Gun Square, which on the death of Deborah Lang fell into and formed part of the testator's residuary estate, now forms part of her estate, and passed to her executor.

Solicitors: *Hicks, Arnold & Bender for all parties.*

(1) 1 Mac. & G. 551. (2) 8 Ch. D. 736.

H. C. G.

P.O. LAWRENCE J. 1920 March 17, 18, 24.

MILLS *v.* CANNON BREWERY COMPANY, LIMITED.

[1920. M. 152.]

Landlord and Tenant—Lease—Covenant not to assign without Licence—Licence not to be arbitrarily withheld—Unreasonable Grounds of Refusal—Foreign Origin of proposed Assignee—Policy of Licensing Justices.

In 1895 the defendants by an underlease demised a public house known as "The Porcupine" for a term of forty-five years from March 25, 1895, at a certain rent. The underlessee covenanted, inter alia, not to assign or underlet the premises without the written licence of the defendants and S. (the head lessor) first had and obtained, but the licence of the defendants should not be arbitrarily withheld provided the licence from S. was obtained, and that the underlessee or the tenant or occupier of the premises for the time being should purchase all malt liquors to be sold or consumed on the premises from the defendants, but there was no covenant by the underlessee to reside on the premises or to carry on the business of a licensed victualler. There was the usual power of re-entry on breach of any of the covenants.

In 1919 the underlease was vested in the plaintiffs, who did not reside on the premises, and they contracted to sell the underlease to A., and applied to S. and the defendants for their written licence to the transaction. A. was of German origin, but in 1912 had become a naturalized British subject and was in other respects a responsible and respectable person.

S. gave his written licence, but the defendants refused for these reasons: (1.) That the purchaser's name and nationality of origin would tend to depreciate the trade of the house; (2.) that in accordance with the regulations or requirements of licensing justices the defendants now required that their licensees should be resident on their licensed premises, and that the purchaser had stated that it was not his intention to reside on the premises; and (3.) that the purchaser was interested in other licensed and business premises and consequently could not give the attention and supervision to "The Porcupine" that should be bestowed upon it:—

Held, that the plaintiffs were entitled to assign the underlease to A. without the written licence of the defendants, for that in the circumstance their refusal was wholly unreasonable.

ADJOURNED SUMMONS.

By an underlease dated August 27, 1895, and made between the defendants (therein called the lessors) of the one part and Alfred Aberg (therein called the lessee) of the other part, the defendants in consideration of 3070*l.* paid to them by the lessee, demised to the lessee a fully licensed public house known

as "The Porcupine" in Charing Cross Road, London, for the term of forty-five years less ten days from March 25, 1895, at the yearly rent of 250*l.*, and at a further rent of 220*l.* in case any of the prohibited trades should be carried on. Amongst the lessor's covenants were covenants (clause 10) not at any time during the term thereby granted to assign, underlet or otherwise part with the underlease or the premises thereby demised or any part thereof without the licence of the lessors and the Marquess of Salisbury (who was the head lessor) first had and obtained in writing for that purpose, but the licence of the lessors should not be arbitrarily withheld provided the licence from the Marquess could be obtained; (clause 11) not without such licence to set up or exercise certain specified trades, nor to do any other act or thing whereby the tenants of the lessors or the Marquess should be annoyed or disturbed in the enjoyment of the premises holden by them; and (clause 12) that the lessee or the tenant or occupier of the premises for the time being should at all times during the term take and purchase all beer and other malt liquors to be consumed or sold on the premises from the lessors or their successors in trade. The underlease contained a proviso for re-entry on breach of any of the lessee's covenants, and a proviso reducing the rent of 250*l.* to 120*l.* per annum so long as the lessee or the tenant or occupier for the time being of the premises should take and purchase all malt and other liquors as aforesaid from the lessors or their successors in trade. The underlease did not, however, contain covenants by the lessee to reside on the premises or to carry on the business of a licensed victualler or to maintain the licence or to devote his whole time to any business that might be carried on thereon.

In 1896 the underlease was assigned to Mrs. Annie Weeks (a widow), who died in November, 1912. The plaintiffs Mills and Wrigglesworth were the executors of her will, and in October, 1919, they agreed to sell the underlease for the residue of the term thereby granted to one H. Appenrodt for 11,250*l.* and, in order to carry out the sale, they applied to the defendants and the Marquess of Salisbury for their written licence to assign the underlease to the purchaser.

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On December 3, 1919, the Marquess of Salisbury gave his licence in writing, but the defendants refused to give their licence to the assignment, and on being asked their reasons for such refusal caused a letter to be written by their solicitors dated November 18, 1919, which gave as the principal reason for the refusal (1.) that the purchaser's name and nationality of origin would tend to depreciate the trade of the house; (2.) that in accordance with the regulations or requirements of licensing justices the defendants now required that their licensees should be resident upon their licensed premises, and that the purchaser had stated that it was not his intention to reside upon the premises; and (3.) that the purchaser was interested in other licensed and business premises and consequently could not give the attention and supervision to "The Porcupine" that should be bestowed upon it.

After some correspondence, in which the defendants adhered to their decision, the plaintiffs issued a summons for (1.) a declaration that on the true construction of the underlease and in the events which had happened the refusal of the defendants to grant a licence to the plaintiffs to assign the underlease to H. Appenrodt was an arbitrary refusal within the meaning of clause 10 of the underlease, and (2.) that notwithstanding such refusal the plaintiffs, without any licence from the defendants, were entitled to assign the underlease to H. Appenrodt.

It appeared from the plaintiffs' evidence that there had been no resident licensee at "The Porcupine" for twenty-five years; that neither Mrs. Weeks nor either of the plaintiffs had resided there, and that the business had been carried on by a manager on their behalf; that there was very limited living accommodation on the premises, and no licensee with a family could live there, only one bedroom being available for his accommodation; that since Mrs. Weeks' death the licence had been in the name of the plaintiff Wrigglesworth; that H. Appenrodt, who was of German origin, had been resident in England some thirty-seven years, and for thirty-three years had successfully carried on business at various licensed premises in London. In 1912 he became a naturalized British

subject and was at present the owner of "The Crown" public house in Charing Cross Road, and was a respectable and responsible person, and if the defendants' consent to the assignment were given he intended to transfer the licence of "The Porcupine" into the joint names of himself and Mr. Evans, the present manager of the plaintiffs.

Mr. King, a director of the defendant company, stated in his affidavit that the beer trade at "The Porcupine" was of considerable amount, and the house with its licence was therefore of great value to the company; that the company owned a large number of licensed houses in London, and when applications were made to the company for tenancies or leases of their licensed houses the two principal points which the directors took into consideration were (1.) whether, if the applicant became the tenant and licensee of the house, he might be expected to give it such efficient and constant supervision as would secure it as far as possible against complaints which would jeopardize or endanger the existence of the licence, and (2.) whether the applicant was or was likely to prove a good man of business, and in this connection whether the applicant proposed to live on the premises and whether he had other interests outside the licensed house which might engage his attention; that they also took into consideration whether the applicant was a natural born British subject or whether he was a foreigner, and that during the past few years the directors had considered it inadvisable to permit applicants who were not natural born British citizens to become occupiers of their houses; that during the past twenty years the requirements and regulations of licensing justices in the County of London had become increasingly stringent, and in many cases the rule of the licensing justices was not to grant licences to applicants except upon condition that such applicants should reside upon the licensed premises and were not interested in other licensed houses; that in consequence of this attitude of the licensing justices the directors had declined to accept any application for one of their houses from any applicant who did not propose to reside upon the premises, and residence upon licensed premises was one of the terms imposed on the

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tenant contained in their form of printed tenancy agreement (which was a quarterly tenancy); that at the board meeting of the company when the plaintiffs' application for permission to assign the underlease to Mr. Appenrodt came under consideration, the matter was most carefully discussed and considered by the directors, that their solicitors were present and advised them thereon, and that after careful deliberation the board declined to grant the application, and instructed their solicitors to write the letter of November 18, 1919; and he denied that the decision of the board had been arbitrary, but on the contrary it was only given after taking all the surrounding circumstances into the fullest consideration, and for the purpose of avoiding as far as possible any risk to the licence.

Jenkins K.C., *Sir A. Bodkin* and *G. D. Pepys* for the plaintiffs. It had never been the law that the owner of a fully licensed house should reside on the premises. Here there is no covenant to reside on the premises or to maintain them as licensed premises. The underlessee can at any time give up the licence and carry on any business that is not one of the prohibited trades. The covenant that the lessee "or the tenant or occupier" is to purchase malt liquors from the defendants shows that the lessee is not bound to reside on the premises. Nothing can be said against the proposed assignee. The word "arbitrarily" means unfairly and unreasonably, that is to say, without any reasonable cause: *Treloar* v. *Bigge* (1); *Quinion* v. *Horne*. (2) The defendants have no interest in the licence. They have only an interest in the malt liquors sold on the premises. They are entitled to consider their interests, but they are not entitled to get a totally extraneous advantage for themselves as the price of their consent by endeavouring to force the owner of the underlease into the position he would be in if he were the holder direct from themselves under one of their tenancy agreements. They are in substance trying to impose a new term on the underlessee which the

(1) (1874) L. R. 9 Ex. 151. (2) [1906] 1 Ch. 596, 603.

Court will not countenance: *Premier Rinks* v. *Amalgamated Cinematograph Theatres.* (1)

Owen Thompson K.C., *A. F. Wootten* and *H. B. Wells* for the defendants. The defendants' refusal is not arbitrary. The authorities show that if a lessor considers the matter and takes legal advice and acts upon that advice his refusal is not arbitrary, although he declines to give the grounds of his refusal, and although the reasons he may give may not be considered good reasons by the Court: *Treloar* v. *Bigge.* (2) Arbitrarily means wholly unreasonably, i.e., without any reason at all: *Barrow* v. *Isaacs* (3), and in that case Kay L.J. points out that consent may be withheld even though the intended underlessee is a proper person, if such withholding is not arbitrary, that an underlessee might desire to carry on a trade which would depreciate the property, and that many other reasons for objecting might be suggested. The onus is on the plaintiffs to show that the refusal of the plaintiffs is wholly unreasonable: *Shanly* v. *Ward.* (4) The definition of the word "arbitrarily" in Latham's Dictionary is "with no other rule than the will," in the Oxford Dictionary it is "without sufficient cause," and in the Imperial Dictionary it is "capriciously." The defendants have not acted capriciously or without sufficient cause. The defendants have a direct interest in the house being carried on as licensed premises. It is tied to them for malt liquors, which is a pecuniary advantage. Admitting that the underlessee is not bound to reside on the premises or to carry on the business of a licensed victualler, yet it is to the defendants' interest to see that whilst that business is carried on it is not carried on so as to occasion a conviction or a forfeiture of the licence. They are only endeavouring to put forward the provisions of licensing justices that require the owner of the licence to reside on the premises. Their objections are reasoned bona fide objections and therefore are not capricious, and if they think it injurious to their interests unless the licensee resides on the premises their refusal is not arbitrary. By seeking to carry out the policy of the licensing justices they get a right of appeal

(1) [1912] W. N. 157.
(2) L. R. 9 Ex. 151, 155–6.
(3) [1891] 1 Q. B. 417, 419, 423–4.
(4) (1913) 29 Times L. R. 714.

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to Quarter Sessions should the licence be endangered or forfeited.

Jenkins K.C. in reply. There has been no licensee resident on the premises for twenty-five years. Evans never had the licence. The observations of Kay L.J. in *Barrow* v. *Isaacs* (1) are only obiter dicta. No doubt licensing justices have an absolute discretion, but it is a discretion to be exercised judicially, which means according to the rule of reason and justice: *Sharp* v. *Wakefield*. (2) It is unreasonable of the defendants to refuse their licence except to a person who will reside on the premises. They cannot say "you shall not assign unless you fulfil our particular conditions": *Bates* v. *Donaldson*. (3)

March 24. P. O. LAWRENCE J. stated the facts and continued: In these circumstances the plaintiffs contend that the defendant company has arbitrarily withheld its licence. The first question to be determined is what is the meaning of the word "arbitrarily" as used in the underlease. Mr. Owen Thompson has referred me to the Imperial Dictionary, Latham's Dictionary, and the Oxford Dictionary, in each of which various definitions of the word "arbitrarily" is found. These definitions include "capriciously," "merely at will," "without sufficient cause," and "with no other rule than the will." In my opinion, in a case like the present the Court does not derive any real assistance from dictionaries. One of the main objects of every dictionary of the English language is to give an adequate and comprehensive definition of every word contained in it, which involves setting forth all the different meanings which can properly be given to the particular word. The Court, on the other hand, in determining what is the true meaning of a particular word used in an instrument which it has to construe, has to ascertain in what sense the parties to that instrument have used the word: all the help the Court can derive from dictionaries in such a case is, in case of doubt, to ascertain that the meaning which it comes to the conclusion

(1) [1891] 1 Q. B. 417, 423–4. (2) [1891] A. C. 173, 179.
(3) [1896] 2 Q. B. 241.

ought to be attributed to the word is one which may properly be given to it. Of far more importance, in my opinion, are the decisions of the Court and the dicta of learned judges as to the true meaning of a particular word when used in the same collocation as in the case under consideration. In the case of *Treloar* v. *Bigge* (1) Kelly C.B. held that the word "arbitrarily" when used in a clause such as the one now under consideration means "without fair, solid, and substantial cause, and without reason given," and later on the same learned judge says that the lessor might refuse his consent "upon any fair and reasonable ground." In *Barrow* v. *Isaacs* (2) Lord Esher considered that "arbitrarily" was equivalent to "wholly unreasonably." In *Quinion* v. *Horne* (3) Farwell J. considered that "arbitrarily" meant "without any reasonable cause." Mr. Owen Thompson admitted, in my opinion rightly, that the mere fact that the defendant company, through its board, had carefully considered the plaintiffs' application for the licence and was advised thereon by its solicitors would not prevent the refusal to grant the licence from being arbitrary if the plaintiffs could show that notwithstanding such consideration and advice the refusal was in the circumstances wholly unreasonable. I do not think that there was really any substantial difference between the definition contended for by Mr. Jenkins and that contended for by Mr. Owen Thompson. In my opinion the expressions "unreasonably," "wholly unreasonably," and "without reasonable cause" practically mean the same thing. Each of these expressions, I think, correctly defines the meaning of the word "arbitrarily" as used in the underlease. In making use of these expressions hereafter I do so in the sense indicated by the learned judges whom I have quoted, and all of whom I think were expressing the same meaning although employing slightly different language.

This brings me to the real question in the case, and that is, whether it can be said in the circumstances that the defendant company in refusing the licence has acted without any

(1) L. R. 9 Ex. 151, 155. (2) [1891] 1 Q. B. 417, 419.
(3) [1906] 1 Ch. 596, 603.

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reasonable cause? I agree with Mr. Owen Thompson that the onus of proof is on the plaintiffs and that the question which I have to decide is not whether the grounds of refusal do or do not commend themselves to my mind as reasonable, but whether in refusing the licence the defendant company acted as a reasonable man might have done in the circumstances, or whether, on the contrary, it acted wholly unreasonably? Now the defendant company has stated in precise language what its grounds of refusal are, the only question therefore is whether the plaintiffs have established that those grounds are unreasonable in the sense I have indicated. As to the first ground of refusal, namely, the German name and origin of the purchaser, I need say but very little. Mr. Owen Thompson (whilst saying that his clients did not abandon the contention that this ground was reasonable) expressly stated that he did not propose to address any argument in answer to the plaintiffs' contention that this ground was wholly unreasonable. I hold that the name and origin of the purchaser did not constitute a reasonable cause for withholding the licence to assign. The only grounds seriously pressed by counsel on behalf of the defendant company were the second and third grounds mentioned in the letter of November 18, namely, that the purchaser had stated that he did not intend to reside upon the premises, and that owing to his other businesses he could not devote sufficient attention to the business of a licensed victualler carried on upon the premises. I think that these two grounds can conveniently be dealt with together. It was stated by counsel for the defendant company, and is proved by the affidavit of Mr. King, that it is the fixed determination of the defendant company not to grant a licence to the plaintiffs to assign the underlease to any purchaser unless such purchaser intends himself to reside upon the premises and personally to devote his whole time to carrying on the business of a licensed victualler thereon. It is an undoubted fact that if a refusal upon this ground is justified the value of the underlease to the estate of Mrs. Annie Weeks will be very seriously affected, as it is practically impossible to procure a respectable and responsible purchaser who would be able and willing to make

his home at "The Porcupine" and devote his whole time to carrying on the business thereon. This fact in itself, however, has in my opinion very little, if any, bearing on the question whether the defendant company's refusal was reasonable or unreasonable: it shows, however, the great importance to the plaintiffs of the question that has arisen. Now, in considering this question it is in my opinion of great importance to bear in mind the nature and contents of the underlease. It contains no covenant by the underlessee to reside upon the premises or to carry on any business thereon, much less to devote his whole time to any business which may be carried on thereon; the underlessee not being bound to carry on the business of a licensed victualler upon the premises can of course surrender the licence at any time without giving rise to any legal claim or objection on the part of the defendant company; the underlessee is tied for malt liquors to the defendant company so long only as he carries on the business of a licensed victualler, and even if he does carry on such business but ceases to buy his malt liquors from the defendant company it is at least open to doubt whether the only result would not be that he would lose the benefit of the abatement clause and would have to pay the full annual rent of 250*l*. It is admitted by Mr. Owen Thompson that the defendant company could not as a condition of granting its licence insist upon the assignee residing on the premises and personally carrying on the business of a licensed victualler thereon. This admission is, I think, rightly made as the imposition of such a condition would in effect be introducing into the underlease a new term which would be inconsistent with the provisions of the underlease and would change its character: see *Premier Rinks* v. *Amalgamated Cinematograph Theatres*(1) As already pointed out, there is nothing in the underlease to prevent the underlessee from using the premises for purposes other than the carrying on of the business of a licensed victualler, and clause 12 shows that it was in the contemplation of the parties that an occupier, not being the underlessee or an assignee or a tenant of his, might be

(1) [1912] W. N. 157.

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carrying on the business of a licensed victualler on the premises. It logically follows from the fact that the defendant company is unable to impose such a condition that, even if the plaintiffs were to find a purchaser who intended to reside upon the premises and to devote his whole time to carrying on the business of a licensed victualler thereon, there would be nothing to prevent such purchaser, after the licence had been granted and the underlease assigned to him, from changing his mind at any moment, and Mr. Owen Thompson frankly admitted that this would be so.

The question which I have to decide really resolves itself into whether, in a case where admittedly no condition of residence or personal conduct of a licensed victualler's business can be imposed, the statement by the proposed assignee that he does not intend to reside upon the premises and personally carry on the business of a licensed victualler thereon can be said to afford a fair and reasonable ground for refusing to grant a licence to assign, or whether a refusal on such a ground is not wholly unreasonable. The professed underlying reason for withholding the licence is that the defendant company desires that the business of a licensed victualler should continue to be carried on upon the premises and that such business should be conducted in what the defendant company conceives to be the best possible manner. If that be the true reason it seems to me, to say the least, strange that the defendant company should refuse to allow the premises to pass from their present ownership into the hands of a man who is proposing to invest the large sum of 11,250*l.* in the purchase of the property with the undoubted intention of securing a profitable return by carrying on thereon the business of a licensed victualler, and who according to the uncontradicted evidence has had considerable experience in the conduct of licensed premises in the immediate neighbourhood and has hitherto been most successful in the management of all his licensed houses. As things now stand neither of the plaintiffs reside on the premises and there is not even a resident licensee. Moreover, even if a purchaser could be found who was willing to reside on the premises he would in all probability not be

such a responsible tenant as the proposed purchaser. I hope I am not doing an injustice to the learned counsel who argued the case for the defendant company or to the defendant company itself when I say that the arguments in support of the defendant company's grounds of refusal (considering the nature and duration of the underlease) appeared to me so far-fetched that I began to doubt whether the real reason for the refusal had been given. I am however loth (and in the absence of any cross-examination I have no right) to entertain the suspicions which crossed my mind in the course of the hearing. I will therefore deal with the argument addressed to me on the footing that the real reasons for the refusal are those which have been urged before me. The way the case has been put by counsel on behalf of the defendant company is as follows: The defendant company carries on the business of brewers, wine and spirit merchants and owners of licensed houses. It owns numerous public houses. It has discovered that some of the licensing authorities are in favour of licences being held by resident owners. Consequently it has inaugurated a policy which consists of placing its public houses in the hands of tenants instead of employing managers to manage them on its behalf. A form of the tenancy agreement which it adopts in furtherance of this policy has been put in evidence. A perusal of this form makes it plain that so far as the defendant company is concerned there is really nothing from a practical point of view to choose between a house in the hands of a manager and a house in the hands of a tenant. The tenancy can be determined by three months' notice on either side, the landlord can at any time enter upon and inspect the premises (including the cellars and stock), he can execute any works on the premises, remove any inside or outside signs or placards which he does not like, and affix any signs and placards he may think fit. The tenant has to reside on the premises and personally conduct the business, is not allowed to carry on any other business, and has to obtain, renew and keep on foot the necessary licences which he must not part with or surrender; a forfeiture of the licence gives

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rise to an immediate right of re-entry. The tenant is not allowed to give any undertaking to the licensing justices in respect of the premises without the previous consent of the landlord; on the determination of the tenancy he must assign and deliver up the premises on twenty-four hours' notice. The tenant is tied to the landlord for beer and other malt liquors and also for wines, spirits and excisable liquors of every kind, and he is not allowed to do or suffer any act or thing whereby the licence may be or become in danger of being forfeited or suspended or whereby the trade or business or goodwill may be prejudicially affected. As regards the pecuniary aspect of the position, of course under the tenancy arrangement the tenant takes the profits of the business, but he has to pay the rent and the price of all liquors supplied, and the defendant company is saved the salary of a manager. I have no doubt that matters are so adjusted that there is practically no difference to the defendant company from a pecuniary point of view between having a manager or a tenant. The policy thus inaugurated with respect to the public houses which the defendant company has, so to speak, in hand cannot in my judgment be applied to the premises comprised in the underlease; to attempt to do so would be to ignore entirely the nature of the underlease which has twenty years still to run, and for the grant of which the defendant company received a sum of 3070*l*. Yet this is precisely what the defendant company is endeavouring to do by its refusal to grant the licence. The defendant company admits that it cannot impose the conditions contained in its tenancy agreements upon an assignee of the underlease, yet it states its determination to refuse its consent to the assignment because the proposed assignee says that he is not going to conform to two of such conditions—namely, the conditions as to residence and personal conduct of the business. In my judgment a refusal based upon such grounds is wholly unreasonable. It was further argued by Mr. Wootten that owing to the tie contained in the underlease the defendant company had an interest in the business of a licensed victualler carried on upon the premises to this extent at all events, that whilst it was being carried on it was

to the interest of the defendant company that it should be carried on in what the defendant company conceived to be the best possible manner. He said that if, as a result of the defendant company's refusal to grant a licence, the plaintiffs were forced to find as a purchaser a licensed victualler who intended to reside on the premises, then, if that purchaser were to do anything which caused the licensing justices to forfeit the licence or to refuse to renew it, the defendant company would stand a better chance of success on an appeal from the decision of the justices if the appeal tribunal were one which favoured resident owners, as the defendant company could then urge that it had done its best to secure the business being carried on by a resident owner. In answer to my question what the defendant company would gain by a successful appeal, Mr. Wootten replied that as in all probability the defaulting owner would not be foolish enough to let the licence go if he, or the defendant company on his behalf, could find a purchaser to whom the licence could be transferred, an arrangement would be likely to result whereby the licence would be preserved. Under the tenancy agreements this contention would be reasonable because in the event of forfeiture or non-renewal of the licence the premises would at once revert to the defendant company, but as applied to the underlease this reasoning is, in my opinion, entirely out of place. A successful appeal by the defendant company could only result either in a benefit to the underlessee, which benefit the plaintiffs are not desirous of having thrust upon them, or it would place the defendant company in a position to bring pressure to bear on the underlessee to surrender the underlease or to transfer it to a nominee of the defendant company, a result which Mr. Wootten disclaimed, no doubt bearing in mind the decision in *Bates* v. *Donaldson.* (1) In these circumstances I hold that the reason put forward by Mr. Wootten does not afford a fair or reasonable ground for withholding the licence.

In the result, for the reasons stated, I have come to the

(1) [1896] 2 Q. B. 241.

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conclusion that the refusal of the defendant company to grant the licence is wholly unreasonable, and I will make an order in the terms asked for by the summons.

Solicitors for the plaintiffs: *Nash, Field & Co.*
Solicitors for the defendants: *Boulton, Sons & Sandeman.*

H. L. F.

SARGANT J. 1919 *Nov.* 26, 27.

DEVERELL *v.* MILNE.

[1918. D. 670.]

Practice—Costs—Breach of Contract—Substantial Claim for specific Performance and Injunction—Minor Claim for and Recovery of Damages—"Action founded on contract"—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116, *sub-s.* 1.

The plaintiff sued the defendant for breach of contract to let him a house-boat for a short period, claiming specific performance, an injunction and damages, and served the defendant with notice of motion for an injunction. Before the motion came on for hearing the defendant let the house-boat to another person. This fact was disclosed when the motion came on, and the action proceeded to trial on the question of damages only, judgment being thereat given to the plaintiff for 25*l.* damages and the costs of the action:—

Held, that the substantial claim being for specific performance and an injunction, which could not be obtained owing to the defendant's having let the boat in breach of her contract, the case was not within s. 116, sub-s. 1, of the County Courts Act, 1888, and that the plaintiff was entitled to costs on the High Court scale.

The principle of *Keates* v. *Woodward* [1902] 1 K. B. 532 adopted.

This was an application by the plaintiff to review the taxing Master's decision when taxing the costs of the action.

The plaintiff, an officer who had been severely wounded, and who had a few days' leave before returning to light service work, had agreed with the defendant to take her house-boat from her on the Thames for a fortnight. After that agreement the defendant had a better offer for the tenancy of the boat, and repudiated the agreement. The plaintiff, in the meantime, had arranged with his sister and friends to go down to the boat

for a fortnight, and on July 9, 1918, he issued a writ of summons in an action against the defendant for specific performance of the agreement to let the boat (dated June 23, 1918), an injunction and damages, and on the same day obtained leave to serve on her notice of motion with the writ for July 12, 1918. The writ and notice of motion were served on July 9, and on July 11 the defendant entered into a binding agreement with another person for the letting of the boat, and gave possession of the house-boat to that person. When the motion for an injunction came on on July 12 the defendant's counsel stated what had occurred, and that it was impossible for the plaintiff under these circumstances to amend the writ and serve the third party within the time necessary to give possession to the plaintiff, even if that person had not got a right which overrode the contract with the plaintiff. No order was made on the motion except that the costs should be costs in the action.

The claim for specific performance by means of an injunction was therefore abandoned, and at the trial of the action on June 5, 1919, Sargant J. found that there had been a binding agreement between the plaintiff and the defendant, and that the defendant had broken the agreement, and he awarded the plaintiff 25*l.* damages, and ordered the defendant to pay the costs of the action.

On taxation, the taxing Master, on the preliminary point being taken as to whether costs should be taxed on the High Court or the County Court scale, ruled that the plaintiff's costs were limited to costs on the County Court scale.

The plaintiff's objections to this ruling were: (1.) That, there being no limitation in the judgment giving the costs, the costs were on the High Court scale; (2.) that, as the primary claim in the action was for an injunction, s. 116 of the County Courts Act, 1888, did not apply; (3.) that assuming s. 116 did apply, sub-s. 1 thereof was limited to actions the primary claim in which was the recovery of a liquidated amount, and that the damages claimed in this action, being unliquidated and awarded in lieu of an

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injunction, sub-s. 1 of s. 116 applied; and (4.) that, although no order was made on the motion for injunction, the plaintiff had not failed on the motion, as the defendant had precluded the Court from granting relief by injunction by putting another person in possession of the boat.

The answer of the taxing Master, disallowing the objection, was that by s. 116 of the County Courts Act, 1888, if in actions of contract less than 100*l.* was recovered, only costs on the County Court scale should be allowed; that the action was founded on contract, and that as only 25*l.* damages were recovered, only costs on the County Court scale could be allowed. He added: "A case somewhat similar arose in 1913: *Baker* v. *Hartmann* and *W. Saville & Co.*, unreported. The action was to recover an organ, and, alternatively, damages for its detention, also for specific performance for 25*l.*, to be reduced to 1*s.* if organ delivered, with costs. The Master held that the action was founded on contract, and taxed the costs on the County Court scale 6. On the summons to review the taxation Scrutton J. upheld the Master's decision." The plaintiff took out a summons to review the taxation, asking that the costs might be directed to be taxed on the High Court scale, which summons was adjourned into Court and heard on November 26 and 27, 1919.

Alexander Grant K.C. and *Cecil W. Turner* for the plaintiff. Sect. 116 of the County Courts Act, 1888, provides that: "With respect to any action brought in the High Court which could have been commenced in the County Court, the following provisions shall apply: (1.) If in an action founded on contract the plaintiff shall recover . . . . a sum of 20*l.* or upwards, but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court; and (2.) if in an action founded on tort the plaintiff shall recover a sum less than 10*l.*, he shall not be entitled to any costs of the action . . . . unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or

unless the High Court or a judge thereof at chambers shall by order allow costs."

But sub-s. 1 of that section does not apply to this case, where the primary or substantial claim is for specific performance of the contract and an injunction. At the time of the issue of the writ of summons the plaintiff was entitled to specific performance, and damages in addition thereto or in substitution therefor. The injunction was claimed as in aid of the specific performance. After the writ had been issued, and ignoring the notice of motion, the defendant let the house-boat to someone other than the plaintiff, and parted with the possession of it to that person, thus rendering it impossible for the plaintiff to proceed with the claim for specific performance and an injunction. The costs ought to be taxed on the High Court and not the County Court scale.

This case is governed by *Keates* v. *Woodward*. (1) There the action was nominally founded upon tort, the plaintiff claiming damages for trespass to land and an injunction. Judgment was entered in the High Court, to which the action had been transferred, and on appeal a Divisional Court directed judgment to be entered for the plaintiff for nominal damages and an injunction, but without costs, on the ground that less than 10*l*. had been recovered in an action of tort, and that the plaintiff was disentitled under sub-s. 2 of s. 116 to costs. The Court of Appeal, however, held that an action which, though nominally brought to recover damages for a tort, included a claim for an injunction as the main part of the relief sought, was not an action founded on tort within sub-s. 2, and that the plaintiff was entitled to the costs of the action. Romer L.J. in his judgment (2) pointed out that, although a plaintiff substantially claiming damage could not take the case out of the section by adding a colourable claim for an injunction when there was, besides the pecuniary claim, a substantial claim for relief of another kind, the section was inapplicable. The claim in this case for an injunction is a substantial

(1) [1902] 1 K. B. 532. (2) [1902] 1 K. B. 537.

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claim for relief of another kind, and the case is not within sub-s. 1, s. 116.

They also referred to *Bradley* v. *Archibald* (1); *Du Pasquier* v. *Cadbury, Jones & Co.* (2); *Trotter* v. *Windham & Co.* (3); and the Annual Practice, 1918, pp. 2234, 2242.]

A. de W. Mulligan for the defendant. The case is within sub-s. 1 of s. 116, and, as the plaintiff could have brought his action for damages in the County Court, and has only recovered 25*l.*, he is only entitled to costs on the County Court scale. In *Keates* v. *Woodward* (4) only nominal damages were claimed. The plaintiff here only succeeded on his claim for damages, and the costs should be regulated by the amount recovered: *Clinton* v. *Bennett* (5); *Solomon* v. *Mulliner.* (6)

SARGANT J. (after stating the facts). When the action came on to be heard the plaintiff succeeded, and I held that there was a good and binding contract, and awarded the plaintiff 25*l.* damages. At the time no application was made to me for a direction that the costs ought to be taxed on the High Court scale, and when an application was made to me some days afterwards I thought that I had not the matter fresh enough in my mind to determine the question, and that such an application ought to have been made at the trial of the action. On the whole, I am sorry I did not then exercise my discretion, and give the plaintiff costs on the High Court scale. I undoubtedly should have done so if the application had been made at the trial. It comes now to this—that there is an order to tax the costs in favour of the plaintiff without a direction as to whether the taxation should be on the High Court scale or the County Court scale.

The taxing Master taxed the plaintiff's costs on the County Court scale. The plaintiff has taken objection to that, and the second objection, which is the one which has been argued

(1) [1899] 2 I. R. 108.
(2) [1903] 1 K. B. 104.
(3) (1907) 23 Times L. R. 676.
(4) [1902] 1 K. B. 532.
(5) [1908] 1 K. B. 109.
(6) [1901] 1 K. B. 76.

before me, is that s. 116 of the County Courts Act, 1888, does not apply, the primary claim in the action being for an injunction. [His Lordship read the taxing Master's answers, and continued:] To my mind *Keates* v. *Woodward* (1), so far as the ratio decidendi is concerned, is absolutely on all fours with this case, but before dealing with it I must say that I am satisfied that the main and principal object of the present action was to obtain an injunction, and not to obtain damages. The plaintiff was a young officer who was recovering from a very serious wound, and who wanted a modest holiday with his sister and certain friends, and wished to have possession of this specific house-boat for that purpose. He made a definite bargain with the defendant, who most shabbily cried off; and I have no doubt that the plaintiff wanted the house-boat for his holiday, and did not want damages. In that state of things he was deprived of the principal object of the action by the deliberate act of the defendant in letting the house-boat between the commencement of the action and the hearing of the motion. In my judgment, the rights of the plaintiff were crystallized at the date of the writ, and no act of the defendant after the date of the writ could affect the right of the plaintiff, if right he had, to recover judgment, and to have his costs taxed on the High Court scale. That he had that right originally is shown by *Keates* v. *Woodward*. (1) There the plaintiff claimed damages for trespass and an injunction. The action was transferred from the Chancery Division to the County Court, and resulted in a verdict for the defendant, for whom judgment was entered. On appeal, a Divisional Court directed that judgment should be entered for the plaintiff for nominal damages and an injunction, but without costs, on the ground that the plaintiff had recovered less than 10*l*. in an action founded on tort, and was disentitled, under s. 116, sub-s. 2, of the County Courts Act, 1888, to the costs of the action, and that there ought not to be any order as to costs. On appeal it was held that "an action which, though nominally brought to recover damages for a tort, includes a claim for

(1) [1902] 1 K. B. 532.

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an injunction as the main part of the relief sought, is not an action founded on tort within the sub-section, and that the plaintiff was entitled to the costs of the action."

It has been sought to distinguish that case from the present one on the ground that in that case there was an actual adjudication in favour of the plaintiff for an injunction, and not merely a claim for one, and that here there has been no such adjudication. In my judgment, that is not a material distinction, because I am convinced that there would have been an adjudication in favour of the plaintiff if the defendant had not adopted the course she did of letting to a third party, and I think that the plaintiff cannot be prejudiced by such a letting pending the action. In my opinion, the rights of the plaintiff were crystallized at the writ, and he is in as good a position for this purpose as if he had obtained an injunction.

But beyond that, it appears to me that, whether an injunction was or would have been granted is beside the question, because the ratio decidendi in all the judgments in *Keates* v. *Woodward* (1) is that the substantial claim in the action was for an injunction. The judgments are not founded on the plaintiff having been successful or not in his action, but on the nature of the relief sought, and that is made abundantly clear in the judgment of Romer L.J. (2), who says: "I wish to guard myself against being understood to say that a plaintiff who is substantially seeking damages can take the case out of the section by adding a colourable claim for an injunction. But when there is, besides the pecuniary claim, a substantial claim for relief of another kind, it seems to me that the section is inapplicable." And Mathew L.J. says: "The Irish Courts have agreed with this decision (3), and it has been held that a claim for an injunction where that is the substantial relief sought takes the case out of the rules limiting the plaintiff's right to costs."

Therefore, the ratio decidendi is founded on the consideration of what was the substantial relief sought—not on what was

(1) [1902] 1 K. B. 532.
(2) [1902] 1 K. B. 537, 539.
(3) Namely, *Danby* v. *Lamb* (1861) 11 C. B. (N. S.) 423.

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the relief actually granted. It is quite true, as Mr. Mulligan said, that in that and in other cases cited some relief was granted, but the ratio decidendi is not founded on the relief having been obtained, but on the substantial relief sought in the action being an injunction and not damages. That, in my judgment, is the case here. I therefore overrule the Master's objections and allow the summons, and direct the costs, including the costs of this summons, to be taxed on the High Court scale.

Leave to appeal was refused both by Sargant J. and by the Court of Appeal.

Solicitors for the plaintiff: *Walters & Co.*
Solicitor for the defendant: *Alfred Allistone.*

F. E.

SARGANT J. 1920 *April* 22.

In re REES.

JONES *v.* EVANS.

[1918. R. 854.]

Charity—Bequest for "missionary purposes"—Admissibility of Evidence as to Nature of Legatee's Work.

Testatrix bequeathed her residuary estate "for missionary purposes" to G. J.:—

Held, (1.) that the Court could admit evidence that the testatrix had often met G. J. at conferences of Christian workers and discussed religious subjects with him, and that before she made her will she had sent him considerable sums of money to aid him in the work in which he was so engaged, which was that of pastor of a church belonging to a body created solely for evangelistic purposes; and (2.) that, having regard to that evidence, the gift was not void for uncertainty but was a good charitable gift.

In re Kenny (1907) 97 L. T. 130 followed.

JANE REES, a widow, by her will, dated October 31, 1917, appointed Isaac Jones executor thereof, and, after specifically

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giving real and personal property and bequeathing pecuniary legacies, left all her other property of whatever description "for missionary purposes" to George Jeffrys of Highbury Gardens, 3, University Avenue, Belfast, and appointed him to be residuary legatee of all that might remain out of the estate after payment of all debts and legacies.

The testatrix died on November 5, 1917.

The evidence showed that Jeffrys went to Ireland in 1915, and that he had ever since carried on work as pastor of a church in Belfast, known as Elim Christ Church, belonging to a body, which was created about 1915, solely for evangelistic purposes, and known as the "Elim Pentecostal Alliance." The central office of the alliance was at Highbury Gardens, 3, University Avenue, Belfast, and was supported by voluntary contributions. There was evidence that Jeffrys often met the testatrix at conferences of Christian workers in 1914 and 1915, and discussed religious subjects with her, and that from time to time, before she made her will, the testatrix sent considerable sums to Jeffrys to aid him in the work in which he was so engaged.

The executor of the testatrix took out an originating summons against Jeffrys and the Attorney-General and the heir at law of the testatrix, raising (amongst other questions) the question whether there was a gift of the residue to Jeffrys for his own personal benefit or whether the gift to him was in trust for the work of the Elim Pentecostal Alliance, or for some other and what charitable object.

Sir Denham Warmington for the plaintiff stated the facts and the question raised by the summons.

Galbraith K.C. and *Harman* for Jeffrys. It is not claimed that the bequest to Jeffrys was for his own benefit unless the charitable purposes are void for uncertainty. The residue is payable to him and meant to be applied by him for the purposes of the work of the evangelistic body to which he belonged. A trust for "missionary purposes" was held to be void, as being too vague and uncertain, in *Scott* v.

Brownrigg. (1) But Warrington J., in *In re Kenny* (2), held that the words were not too general, and that he was entitled to look at the evidence that the legatee was engaged in the work of Christian missions, and that he and his work were known to the testatrix.

Austen-Cartmell for the Attorney-General.

G. D. Johnston, for the heir at law and next of kin of the testatrix. The legacy is void for uncertainty. *Scott* v. *Brownrigg* (1) shows that "missionary purposes" are not necessarily restricted to Christian missionary purposes, but may include other kinds of missionary work—e.g., political work. Evidence as to the kind of work which Jeffrys was doing should not be admitted: *In re Davidson* (3); *Dunne* v. *Byrne.* (4)

A. Grant K.C., Hildyard K.C. and *J. G. Wood* for other persons not interested in the question argued.

SARGANT J. (after stating the facts and the question involved). The question lies between the legatee George Jeffrys and the Attorney-General on the one hand and the heir at law and next of kin of the testatrix on the other hand. On behalf of the former it was contended that the gift was made to Jeffrys for missionary work, and it seems to be reasonably clear on the language of the will that the residue was given for missionary work, and that Jeffrys was to have the carrying out of such work. On behalf of the heir at law and next of kin, however, it was urged that, as the object of the gift was expressed in such very wide terms, the case was like the Irish case of *Scott* v. *Brownrigg* (1), where the gift was, as here, for "missionary purposes," and it was held that the gift was void as being too vague and uncertain.

The expression "missionary purposes" is ambiguous, and may comprise objects which are not charitable; and a gift for such purposes is liable to be void for uncertainty in the absence of sufficient indication that the expression

(1) (1881) 9 L. R. Ir. 246.
(2) 97 L T. 130.
(3) [1909] 1 Ch. 567.
(4) [1912] A. C. 407.

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refers to missionary work in the narrower or popular sense. But in *In re Kenny* (1) it was held that although the term for "missionary purposes" was in itself ambiguous, it might be narrowed by evidence of surrounding circumstances tending to show that the testator used the expression in the popular sense of Christian missionary work. The admission of such evidence seems to me to be reasonable and sensible; and in the case now before me the evidence tendered as to the missionary work carried on by George Jeffrys, and the knowledge of the testatrix of that work and as to the desire she had expressed to aid him in that work after her death, as she had been doing in her lifetime, make the case even stronger than *In re Kenny*. (1)

It was argued that *In re Kenny* (1) was inconsistent with *In re Davidson* (2), and that the gift was void for uncertainty on the principle of that case and of *Dunne* v. *Byrne*. (3) But in each of those cases the language referring to the objects of the gift was unambiguous, and on that ground those cases are distinguishable from *In re Kenny*. (1) That the want of ambiguity in the language in *Dunne* v. *Byrne* (3) was relied on by Lord Macnaghten clearly appears from the following passage in his judgment, namely: "It is difficult to see on what principle a trust expressed in plain language, whether the words be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee."

I therefore hold that the gift to Jeffrys was a valid charitable bequest, and I direct payment of the residue to be made to him and to be held by him for the purposes of his missionary work.

Solicitors: *Hicks, Arnold & Bender; Helder, Roberts, Giles & Co.; Cartwright, Cunningham & Co.; Solicitor to the Treasury.*

(1) 97 L. T. 130. (2) [1909] 1 Ch. 567.
(3) [1912] A. C. 407, 410.

F. E.

SARGANT J.
1920
May 3.

In re WILKINS.

WILKINS *v.* WILKINS.

[1920. W. 157.]

Will—Construction—Gift of Residue to Five named Persons—Codicil—Revocation of Gift to One of them—Confirmation of Will as modified by Codicil.

Testator, by his will, made in 1907, gave the residue of his real and personal estate to "my five children, X., H., F., C. and L., in equal shares as tenants in common." In 1914 H. was adjudicated a bankrupt, and by clause 2 of a codicil made in 1915 testator revoked the share of residue given to H. as one of his five children. By clause 3 of the codicil he declared that 500*l.* paid for the benefit of L. was to be taken in part satisfaction of her share of residue as one of his five children "and accordingly that such residue shall be divided between the children entitled to the same in such manner that the share of the said L. shall be less in amount than the shares of my other children by the sum of 500*l.* Subject as aforesaid I confirm my said will":—

Held, that although the effect of mere revocation of the gift of a share of residue to H. would be that the share would be undisposed of, this result was prevented by clause 3 of the codicil; that the testator was thereby directing that the whole residue was to be divided among the children who were taking title under the will and codicil combined—namely, the four named children other than H.

In re Whiting [1913] 2 Ch. 1 not followed.

By his will, dated September 25, 1907, William James Wilkins, after giving pecuniary legacies and making specific devises, by clause 8 made the following disposition: "I devise and bequeath all the residue of my real and personal estate, whatsoever and wheresoever (including all cash at the house at the time of my decease, or standing to my credit on either deposit or current account at the bank, and whether the same shall relate to my said business or otherwise) unto my said five children, Herbert Frederick Wilkins, Harold Wilkins, Frank Leonard Wilkins, Clara Pilkington, and Lilian Amy Ward in equal shares as tenants in common."

Harold Wilkins, on August 13, 1914, was adjudicated a bankrupt, and had not obtained his order of discharge when the summons below mentioned was taken out.

A codicil, dated May 20, 1915, to the will, made after the

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testator had obtained knowledge of the bankruptcy, contained the following clauses :—

" 2. I revoke the gift of a share of the residue of my real and personal estate (including certain cash) which I devised and bequeathed by para. 8 of my said will to my said son Harold Wilkins as one of my five children ;

" 3. And whereas since the execution of my said will I have paid the total sum of 500*l.* to or for the benefit of my daughter, Lilian Amy Ward, now I hereby declare that the said sum of 500*l.* so paid to or for the benefit of my said daughter, shall be taken by her in part satisfaction of her share of the residue of my said real and personal estate which I devised and bequeathed by para. 8 of my said will to my said daughter as one of my five children, and accordingly that such residue shall be divided between the children entitled to the same in such manner that the share of the said Lilian Amy Ward shall be less in amount than the shares of my other children by the sum of 500*l.* Subject as aforesaid I confirm my said will."

The testator died on February 22, 1917, leaving surviving him his widow (Emma Wilkins), the five children above named, and two other children—namely, Ernest Arthur Wilkins (his heir at law and one of his next of kin) and Percy Lionel Wilkins.

Herbert F. Wilkins and Percy L. Wilkins, the executors and trustees of the will, took out an originating summons against Emma Wilkins, Ernest A. Wilkins, the trustee in bankruptcy of Harold Wilkins, Frank L. Wilkins, Clara Pilkington, and Lilian A. Ward, for the determination of the question whether, on the true construction of the will and codicil, the one-fifth share of residue given by clause 8 of the will to Harold Wilkins and revoked by clause 2 of the codicil was divisible among the four other children named in clause 8 of the will or was undisposed of.

Greenland for the plaintiffs stated the facts and the questions raised by the summons.

R. H. Hodge for the first two defendants. There is an intestacy as to the one-fifth of residue given by clause 8 of

the will, and that share does not go to the other four children named in the clause, except as next of kin entitled to participate in such part of the share as is personalty: *Sykes* v. *Sykes.* (1)

Sheldon for the trustee in bankruptcy of Harold Wilkins. In *Sykes* v. *Sykes* (1) Lord Cairns L.C. said: "The cases are clear, that if there is a devise or bequest of residue to a number of persons nominatim as tenants in common, and then a revocation of the devise or bequest of one of the shares, that share does not fall into the residue, but becomes undisposed of and goes to the next of kin or heir at law. That was decided, if a decision was necessary, by the case of *Cresswell* v. *Cheslyn* (2), and subsequent cases have occurred in which the same principle has been fully recognized. *Harris* v. *Davis* (3) was one of them, in which there was no doubt thrown upon the principle, though the operation of *Cresswell* v. *Cheslyn* (2) was excluded by the very special words in the codicil." *In re Palmer* (4) is distinguishable, for there the codicil declared that the share of residue given to one of the legatees should be restricted to a life interest, and that upon her death it should fall into and form part of the residue. Although it was held that the share on that death was divisible between the other residuary legatees, Lindley L.J. (5) recognizes the rule laid down in *Cresswell* v. *Cheslyn* (2) and *Sykes* v. *Sykes.* (1) The rule is also recognized in *In re Wood's Will.* (6) The codicil there confirmed the will except so far as it was altered by the codicil. The legatee of part of the residue had died before the codicil was made, and a legacy of a fixed sum was given out of his share, but it was held that any difference between that sum and the amount of the share was undisposed of and went to the next of kin.

In *In re Whiting* (7), the residue was given by will to forty-six named persons; by the codicil the gifts of shares to two of them were revoked, and the testator in all other

(1) (1868) L. R. 3 Ch. 301, 303.
(2) (1762) 2 Eden, 123; affirmed as *Cheslyn* v. *Cresswell* (1763) 3 Bro. P. C. 246.
(3) (1844) 1 Coll. 416.
(4) [1893] 3 Ch. 369.
(5) [1893] 3 Ch. 372, 373.
(6) (1861) 29 Beav. 236.
(7) [1913] 2 Ch. 1.

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respects confirmed his will, and Joyce J. held that the whole residue passed under the will, as altered and republished by the codicil, to the other forty-four persons named. But it is submitted that *In re Whiting* (1) is contrary to the settled rule established by previous cases: that the share of Harold was undisposed of; and that such part of it as consists of personalty went to the next of kin of whom he is one, and that his share therein is taken by his trustee in bankruptcy.

Gavin T. Simonds for the defendants, F. L. Wilkins, C. Pilkington and L. A. Ward. *In re Whiting* (1) shows that a mere revocation of the gift to Harold does not cause an intestacy as to his share. But however that may be, the share of residue given by the will to Harold, the gift of which is revoked by clause 2 of the codicil, would, no doubt, be undisposed of but for clause 3 of the codicil. But clause 3 was made after the revocation of the gift to Harold, and with the evident intention that Harold's share was not to be undisposed of but that the whole residue including his share should go to the other four residuary legatees. The residue is to be divided amongst "the children entitled thereto," subject to which and the deduction to be made from Lilian's share, the will is confirmed. The effect is to bring the will down to the date of the codicil, and effect the same disposition of the residue as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alteration made by the codicil: *In re Fraser*. (2)

SARGANT J. (after reading the material parts of the will and clauses 2 and 3 of the codicil, referring to Harold Wilkins' bankruptcy and stating the question raised by the summons, continued:) There is a clear revocation of the gift to Harold. The testator had in fact seven children, and if the codicil is construed as creating an intestacy, the eldest son will, as heir at law become entitled to so much of Harold's one-fifth share as consists of realty, and he and Harold will as next of kin share in such part of the one-fifth share as consists of personalty.

(1) [1913] 2 Ch. 1. (2) [1904] 1 Ch. 726, 734.

The question to be decided is whether the revocation of the gift of one-fifth share to Harold is mere revocation leaving that share undisposed of, or whether the effect of the codicil is to divide the whole of the residue between the four other residuary legatees named in the will. It was argued that clause 2 of the codicil and the confirmation of the will "subject as aforesaid" at the end of clause 3 transferred the residue to the four other residuary legatees. It was also argued that there was a sufficient indication in the previous part of clause 3 of the codicil to show that the testator was disposing of the whole of his residue among his four named children, the gifts to whom were not revoked.

As to the first point, that there was a mere revocation of the gift to Harold, but no intestacy, the case relied on for the residuary legatees other than Harold was *In re Whiting*. (1) With all respect to Joyce J., I am of opinion that the decision of that learned judge is opposed to the authorities, and is in conflict with *Cresswell* v. *Cheslyn* (2), *Sykes* v. *Sykes* (3) and *In re Palmer* (4). I do not think that the decision in those cases turned upon any special language in the wills. The reasoning is general, and is expressed by Lindley L.J. in *In re Palmer* (4) as follows. Speaking of *Humble* v. *Shore* (5) he says: "The reasoning of Wigram V.-C. is in my opinion very unsatisfactory. He treats the direction, that the share shall fall into the residue as expressing no intention as to its ultimate destination; he treats such a direction as amounting to no more than the law would imply. I cannot myself adopt this view. If a testator, after bequeathing his residuary estate in shares, simply revokes a gift of one of those shares, he takes that share out of the residue, and, that share being taken out of it, must, unless otherwise disposed of, be treated as undisposed of, as in *Cresswell* v. *Cheslyn* (2) and *Sykes* v. *Sykes*. (3) This I follow; but when a testator revokes a gift of a share of the residue, alters the gift, and, subject to that alteration, directs the shares

(1) [1913] 2 Ch. 1.
(2) 2 Eden, 123; 3 Bro. P. C. 246.
(3) L. R. 3 Ch. 301.
(4) [1893] 3 Ch. 369, 372.
(5) (1847) 7 Hare, 247.

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to fall again into his residue, he does not mean that such shares shall be treated as ultimately out of the residue, but as ultimately in it, and to go as part of it to those to whom he leaves it. To ascertain who are to take the residue, not only the will, but also codicils, must be attended to ; but according to *Humble* v. *Shore* (1), although a testator has disposed of his residuary estate, including a particular part of it, that part cannot be considered as going with the rest. I confess I cannot follow this."

This is a recognition by high authority that the mere revocation in a codicil of a share of the residue does not give that share to the other residuary legatees. Joyce J., in *In re Whiting* (2), relied on the reasoning in *Harris* v. *Davis* (3), but the learned judge who decided that case distinguished it from *Cresswell* v. *Cheslyn* (4) on the particular language of the will. In cases such as *Cresswell* v. *Cheslyn* (4) and *Sykes* v. *Sykes* (5) the effect of the revocation by the codicil was merely to strike the share out of the original gift of the residue and leave the share without any words applying to it. And I should have decided in this case that there was no disposition of the revoked share but for the important affirmative words in clause 3 of the codicil, which is as follows : " And whereas since the execution of my said will I have paid the total sum of 500*l.* to or for the benefit of my daughter Lilian Amy Ward, now I hereby declare that the said sum of 500*l.* so paid to or for the benefit of my said daughter shall be taken by her in part satisfaction of the share of the residue of my said real and personal estate which I devised and bequeathed by clause 8 of my said will to my said daughter as one of my five children." So far the testator is only equalising the share of Lilian, and there is nothing to show an intention by the testator to deal with the residue, but then come these words : " and accordingly that such residue shall be divided between the children entitled to the same in such manner that the share of the said Lilian Mary

(1) 7 Hare, 247.
(2) [1913] 2 Ch. 1.
(3) 1 Coll. 416.
(4) 2 Eden, 123 ; 3 Bro. P. C. 246.
(5) L. R. 3 Ch. 301.

Ward shall be less in amount than the share of my other children by the sum of 500*l.*"

Can those words be reasonably construed by holding that they refer to the four-fifths of the residue given to Lilian and her sister and brothers other than Harold, or do they amount to a direction as to the disposition of the whole residue and not of four-fifths of it? In my judgment, the testator is dealing by these words with the whole residue and directing it to be divided amongst the children entitled to the same. Then is the fair meaning that it is to be divided amongst Lilian and the four other children named in clause 8 of the will, or amongst the children entitled to the same having regard to the fact that the testator had revoked the gift to Harold? In my opinion the testator is ultimately directing that the whole of the residue is to be divided among the children who are taking title under the will and codicil combined, that is to say, amongst the four children other than Harold. Harold was not one of the children taking title, having regard to the revocation.

Solicitor for all parties except the trustee in bankruptcy: *H. E. Aston.*

Solicitors for the trustee in bankruptcy: *Tarry, Sherlock & King.*

F. E.

PETERSON J.

1920

Jan. 12, 13, 14, 15, 16, 19, 20; Feb. 20.

HODGES *v.* WEBB.

[1919. H. 2507.]

Trade Union—Trade Dispute—Masters' Association and Rival Workmen's Unions—Procuring Dismissal of Members of unrecognized Union—Coercion—Threats—Warning—Cause of Action—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3; *s.* 5, *sub-s.* 3.

In 1919 the plaintiff was employed as a "charge hand" by a firm of contractors on work on which most of the workmen belonged to the defendant's trade union. The trade union to which the plaintiff belonged was not recognized by the defendant's Union, which regarded the members of the plaintiff's Union as non-unionists. This policy was being strongly opposed by the Masters' Association, and for some time past the question of the employment with unionists of non-unionist workmen in general and of the plaintiff's Union in particular had been under discussion between the defendant's Union and the masters, accompanied in one instance by a strike, which was still unsettled. The defendant, who was the London District Secretary of his Union, was sent to the place of the plaintiff's employment to investigate complaints about the employment of non-unionists, with power to call out the Union men. The defendant asked the plaintiff to join his Union, and on the plaintiff's refusal the defendant called out all the Union men, thereby stopping the work, and subsequently informed the plaintiff that similar trouble would occur on any job on which the plaintiff was employed. The defendant told the manager of the company for which the work was being done that no further work would be done until the plaintiff had been removed. When the Masters' Association subsequently inquired whether the job would be allowed to proceed if the plaintiff were discharged, the defendant replied that if the plaintiff were discharged and a member of the defendant's Union put in charge, the job could proceed at once. The contractors accordingly dismissed the plaintiff, who then brought this action for damages, and an injunction on the ground that the defendant had by threats to the plaintiff or his employers illegally induced, coerced and procured his dismissal:—

Held, (1.) that there was an existing trade dispute between employers and workmen connected with the employment of the plaintiff and others within the meaning of s. 5, sub-s. 3, of the Trade Disputes Act, 1906, and that the members of the defendant's Union were called out by him in furtherance of such trade dispute.

Valentine v. *Hyde* [1919] 2 Ch. 129 discussed.

(2.) That there were no threats or coercion used by the defendant against the plaintiff or his employers for which the defendant could be sued either by him or them.

The meaning of "coercion," "threat" and "warning" discussed.

Allen v. *Flood* [1898] A. C. 1 and *Quinn* v. *Leathem* [1901] A. C. 495 considered.

In the absence of conspiracy or unlawful combination, a firm or even emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is not a threat for which the speaker can be held liable at law.

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WITNESS ACTION.

The following statement of the facts and results of the evidence is taken from the considered judgment of the Court.

"In this case the plaintiff alleges that the defendant, by unlawfully threatening the plaintiff with violence and loss, illegally induced, coerced and procured his dismissal from his employment with Messrs. Tyler & Freeman; and further, and in the alternative, that by threatening the plaintiff's employers with loss, he illegally induced, coerced and procured the dismissal of the plaintiff from his employment; and he asks for damages and for an injunction restraining the defendant from wrongfully interfering with his employment, and his right to dispose of his labour as he will; and from continuing the wrongful acts of which he complains, or committing other acts of a similar character.

At the material dates the plaintiff was a "charge hand," or foreman electrician, in the employment of Messrs. Tyler & Freeman. He was and is a member of the National Association of Supervising Electricians. The defendant is the London District Secretary of the Electrical Trades Union. The National Association of Supervising Electricians, commonly known as the N. A. S. E., was formed in the year 1914, and at first was called the Association of Supervising Electricians. It was then in the main an educational institution, and by its rules was expressly prohibited from taking part in trade disputes. In 1918 it was registered as a Trade Union, with new rules, which made provision for trade disputes and strikes, and the protection of its members in such cases; but it has failed to obtain recognition by the Trades Union Congress, and it is apparent that, rightly or wrongly, the Electrical Trades Union, which is a workmen's trade union, considers that there is ground for believing that the National Association of Supervising Electricians is under the influence of, or

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sympathetic with, the employers in that industry. The Electrical Trades Union, rightly or wrongly, objects to its own members working with members of the National Association of Supervising Electricians.

"At the beginning of 1919 the Electrical Trades Union had withdrawn all its members who were employed by one firm, because the firm employed members of the National Association of Supervising Electricians; and the strike still remains unsettled. It is, I think, plain, that this was an active and burning question between the employers and the workmen in the electrieal industry; for on September 30, 1919, the London section of the National Federated Electrical Association (which is the Employers' Association) passed this resolution: 'After considerable discussion it was decided that, in view of the policy adopted by the E. T. U.'—that is, the Electrical Trades Union—'objecting to members working with members of the N. A. S. E., the London section of the N. F. E. A. are unanimously opposed to yielding in any sort of way to such policy; to call upon all members on no account to discharge members of the N. A. S. E. when called upon to do so by the E. T. U.; to take action when required in support of any of the members who may be attacked through their Supervising Engineers.'

"Messrs. Tyler & Freeman were and are members of the London section of the Employers' Association, and Mr. Tyler at least took an active part in its deliberations. It seems to be clear that the Electrical Trades Union had adopted the policy of objecting to its members working with the members of the National Association of Supervising Electricians, and, rightly or wrongly, the workmen's union considered that the National Association of Supervising Electricians was not a genuine and independent workmen's Union, and that its members were on the same footing as non-unionists, and that there was an active dispute on this subject between the employers and the workmen's Union. It is also the fact that the employment of non-unionist men with members of the Electrical Trades Union had for a long time been the subject of contention between that Union and the Employers'

Association. As Mr. Tyler said: 'Our association is out to come to an agreement on the question of non-unionists; we have made up our minds to fight unjustifiable strikes on the ground (amongst others) of non-unionists.' In August, 1919, Messrs. Tyler & Freeman, having a contract with the Watford Manufacturing Company for electrical work at the company's factory, which bears the name of Delectaland, sent to the job various members of the Electrical Trades Union and several non-unionist workmen, and also the plaintiff, who occupied the position of 'charge hand' or foreman. No difficulties with the workmen in connection with this job seem to have arisen before September, 1919. In that month, however, complaints by the builders' labourers on the job that non-unionists were being employed on electricians' work were brought to the attention of the Watford branch of the Electrical Trades Union. Representations were also made to the branch that some of the electricians were not receiving out-work allowances, and that the men were working more than 47 hours a week without overtime pay, and were not receiving the standard rates of pay. In consequence of these complaints, a deputation from the Watford branch, consisting of Messrs. Evans and Horton, was received by the London District Executive of the Union, who thereupon instructed the defendant, who is the District Secretary, to go to Watford, and, in conjunction with the two delegates, to clear up any grievances as far as possible, and, as the defendant added, to prevent trouble. But in addition to the authority given to him by those instructions, the defendant had a general power to withdraw men from work 'at Delectaland or any other job.'

"On October 13, 1919, the defendant, with Messrs. Evans and Horton, went to Delectaland. They entered the Despatch Department, and asked one of the men whom they found there to collect the other electricians who were employed at the works, and also to bring the foreman. Up to this time the defendant had not heard of the plaintiff, and did not know anything about him. The men were assembled, and those who were non-unionists at once consented to join the Union;

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and in their case there is no evidence that any pressure was used or needed. Then the plaintiff arrived, and a conversation took place between him and the defendant. There was a controversy as to this conversation. According to the plaintiff the defendant asked him if he had an E. T. U. ticket. The plaintiff answered: 'No, I am a member of the N. A. S. E.'; and the defendant replied: 'Well, you will have to leave the job'; and thereupon the plaintiff thanked him, and walked away. I do not think that this is a complete account of this conversation. In my opinion the defendant did ask the plaintiff to join the Electrical Trades Union, and the plaintiff refused to do so; and thereupon the defendant told him that he should have to call the men off the job, and that they would not return unless he was off the job. The defendant went to the men and told them that as the plaintiff had refused to join the Electrical Trades Union, he had no option but to ask them to cease work. The men, both those who were already members of the Electrical Trades Union and those who had agreed to join the Union, ceased work, and packed up their tools. On the evidence, it seems clear that there were no high words at this interview. A few minutes afterwards the defendant and Messrs. Evans and Horton met the plaintiff in the yard, and another conversation took place. Here, again, there is some divergence of testimony. The evidence agrees that the defendant again asked the plaintiff what he was going to do, or whether he was prepared to take up an E. T. U. ticket; that the plaintiff answered that he had an old one at home, and when asked why he had joined the E. T. U. replied: 'Compulsion; nothing more or less.' This part of the conversation referred to the fact that the plaintiff had at an earlier date, when he was on another job, joined the Electrical Trades Union in order to prevent a strike of the workmen; but up to this interview the defendant was wholly unaware of the fact that the plaintiff had once been a member of the Union. The plaintiff, however, stated that the defendant then shook his fingers in the plaintiff's face and said: 'I will compel you to join again, or take away your

livelihood.' As to the allegation that the defendant made a threatening gesture (which appears to be the threat of compulsion in para. 5 of the Statement of Claim), after hearing the witnesses, I do not believe that it was made." [His Lordship reviewed the evidence on this point and continued :] "After seeing the witnesses, I have come to the conclusion that the words suggested by the plaintiff were not used ; but that the defendant did say, when the plaintiff intimated that he would not join the Electrical Trades Union, that trouble, or this sort of trouble, would occur on any job on which he was employed. There was some suggestion that this conversation was carried on in loud and threatening tones ; but I am not on the evidence prepared to accept this view. After this conversation, as appears from an interview with the defendant, reported in the *Watford Post*, which the defendant admitted was substantially accurate, the defendant informed Mr. Minton, the Managing Director of the Watford Manufacturing Company, that no electrical work could be done in the extension of the company's factory until the plaintiff had been removed. In this narrative I have not referred to the question whether there was any discussion at Delectaland with reference to rates of pay, hours of work or out-work allowances, as I am satisfied that the only effective reason for calling on the electricians to cease work was the refusal of the plaintiff to join the Electrical Trades Union.

"The remaining facts, so far as they are material, appear from the correspondence. The defendant, on October 14, communicated by telephone with Mr. Tyler. Mr. Tyler's firm on the same day wrote inquiring whether the only grievance was that the plaintiff was not a member of the Electrical Trades Union. Mr. Wyatt, the Assistant London District Secretary, replied on October 14 that the men, members of the Electrical Trades Union and non-members who had agreed to join the Electrical Trades Union, came out together owing to the fact that the plaintiff was a member of the National Association of Supervising Electricians, and also as a result of the arrogant attitude he adopted to Mr. Webb, upon being approached in the matter. If this was

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intended to represent that the men came out in resentment of the plaintiff's attitude to the defendant, it plainly is not correct. If it was meant to convey the impression that the defendant, owing to what is described as the arrogant attitude of the plaintiff, requested or directed the men to cease work, it is, I think, equally incorrect. It is true that the defendant in his evidence described the plaintiff's attitude towards him at both of the conversations to which I have referred as 'distinctly offensive.' It was, perhaps, somewhat flippant but I see no ground for saying that it was arrogant; nor after seeing the witnesses do I think it would be fair to draw the inference that the men were withdrawn from their work because the defendant was annoyed by the plaintiff's observations. They were, in my opinion, withdrawn because the plaintiff refused to join the Electrical Trades Union. After receiving Mr. Wyatt's letter, Messrs. Tyler & Freeman referred the matter to the Employers' Association, the National Federated Electrical Association; and on October 17 the secretary, Mr. Tate, inquired why the men had been withdrawn. On October 30 the defendant replied that the particulars were known to Mr. Tyler. On October 31 Mr. Tate wrote that he had heard from Messrs. Tyler & Freeman that the trouble had been caused by the employment of the plaintiff, and inquired whether the job would be allowed to proceed if the plaintiff was discharged. On November 3 the defendant wrote: 'This member of the E. T. U. ran out, being excluded for arrears. He then joined the N. A. S. E., and when approached by myself, refused to rejoin the E. T. U., although I approached him in a perfectly amicable manner. If this man is discharged and a member of the E. T. U. put in charge of the job, the said job can proceed at once." Thereupon Messrs. Tyler & Freeman, who had received notice from the Watford Manufacturing Company that the work must be pushed on, and had, as Mr. Tyler said, 'no option but to discharge the plaintiff,' on November 13 dismissed the plaintiff. The plaintiff remained out of employment until December 16, when he resumed work with Messrs. Tyler & Freeman on another job.

"It is clear that the men were not withdrawn because the plaintiff had once been a member of the Electrical Trades Union and left that Union. The men were called out before the defendant had heard of this fact. The reason for this strike was, that the plaintiff, being a member of the National Association of Supervising Electricians, refused to join the Electrical Trades Union. I ought to add that in this case there is no suggestion that the defendant induced any breach of contract between the employers and their workmen, nor is it a case in which there is any allegation of conspiracy or unlawful combination."

Hughes K.C. and *H. G. Purchase* for the plaintiff. On the facts there has been a clear breach of the plaintiff's rights: *Quinn* v. *Leathem* (1); and the only possible answer is under s. 3 of the Trade Disputes Act, 1906. Sect. 5 (3.) defines a trade dispute, and we submit that there was no such trade dispute in existence in this case: *Conway* v. *Wade* (2); *Larkin* v. *Long* (3); *Valentine* v. *Hyde* (4), which is closely in point.

Cunliffe K.C. and *R. H. Hodge* for defendant. The right of any person, whether a trade unionist or not, to refuse to work with any other person is absolute. Every trade unionist as well as every non-unionist has a right to dispose of his labour as he pleases.

The Electrical Trades Union were endeavouring to enforce a question of principle which affected a class, and no personal attack upon the plaintiff was intended.

Before the Trade Disputes Act, 1906, what was done in this case would not have been actionable. No legal right was violated and no unlawful act was done or unlawful means employed; one of these elements must be present to support any right of action: *Allen* v. *Flood* (5); which case, on the facts, is indistinguishable from this. No coercion was employed: *Mackenzie* v. *Iron Trades Employers' Insurance*

(1) [1901] A. C. 495.
(2) [1909] A. C. 506.
(3) [1915] A. C. 814.
(4) [1919] 2 Ch. 129.
(5) [1898] A. C. 1.

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Association. (1) Further, the right of the Union men was not limited to refusing to work; they were entitled to tell their employers, either through the defendant or directly, why they refused to work. In the absence of illegality a warning does not become a threat: *Allen* v. *Flood* (2); *Santen* v. *Busnach* (3); and the illegal element is essential for invoking the assistance of the Court: *Davies* v. *Thomas* (4); *Gibson* v. *Lawson*. (5)

Cases of combination to injure or of unlawful object such as *Quinn* v. *Leathem* (6); *Giblan* v. *National Amalgamated Labourers' Union* (7); *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (8); and *Pratt* v. *British Medical Association* (9), have no application to this case.

Further, the defendant is completely covered by the Trade Disputes Act. The evidence shows that there was an existing trade dispute between masters and workmen on the question of unionists working with non-unionists. What was done in this case was done in a "trade dispute" within the meaning of the Act, and this case answers nearly all the tests suggested by s. 5, sub-s. 3, and it was also done in contemplation or furtherance of a trade dispute within the meaning of s. 3.

In *Conway* v. *Wade* (10) the only point was whether there was evidence to justify the finding of the jury. *Larkin* v. *Long* (11) was a case of combination, and there was no trade dispute. *Dallimore* v. *Williams* (12) shows that it does not matter if the motive is malicious. *Valentine* v. *Hyde* (13) was a different case from this because here there was unquestionably a trade dispute, and in so far as it was a decision on the Act, we submit that the case was wrongly decided.

Purchase in reply. The attempt to apply *Allen* v. *Flood* (14) to the present case and to distinguish both from cases like *Quinn* v. *Leathem* (6), on the ground that there was no element

(1) 1910 S. C. 79.
(2) [1898] A. C. 1.
(3) (1913) 29 Times L. R. 214.
(4) [1920] 1 Ch. 217.
(5) [1891] 2 Q. B. 545.
(6) [1901] A. C. 495.
(7) [1903] 2 K. B. 600.
(8) [1905] A. C. 239.
(9) [1919] 1 K. B. 244.
(10) [1909] A. C. 506.
(11) [1915] A. C. 814.
(12) (1914) 30 Times L. R. 432.
(13) [1919] 2 Ch. 129.
(14) [1898] A. C. 1, 72, 73.

of conspiracy or combination, is fallacious, because the power of force behind the secretary of a powerful trade union is at least as great as the power of force derived from the combination of a number of workmen. The evidence shows that there was coercion and intimidation by the defendant, both of the plaintiff and his employers, within the meaning of Bramwell B.'s words in *Reg.* v. *Druitt* (1), quoted and adopted by Lord Halsbury L.C. in *Allen* v. *Flood* (2), and within the meaning of Lord Halsbury's further observations in that case. The defendant, the officer of a powerful trade union, interfered by threats with the plaintiff's common law right to dispose of his labour, whereby the plaintiff suffered loss and is entitled to recover. [He referred to *Allen* v. *Flood* (3); *Quinn* v. *Leathem* (4); *Giblan's Case* (5); *South Wales Miners' Case* (6); *Pratt's Case* (7); *Valentine* v. *Hyde* (8); and *Davies* v. *Thomas*. (9)]

That there was no existing trade dispute within the meaning of the Act appears conclusively from the fact that the Union men were working under the plaintiff until the defendant's interference, and that as soon as the plaintiff was dismissed they at once returned to work. The true explanation is that there was a personal vendetta against the plaintiff, and that his employers were coerced into dismissing him.

Cur. adv. vult.

Feb. 20. PETERSON J., after stating the facts and result of the evidence as above set out, continued: The plaintiff's case depends upon the following propositions: (1.) That the defendant, before withdrawing the men, stated to the plaintiff that as the plaintiff refused to join the Electrical Trades Union, he should have to call the men off the job, and they would not return so long as he remained; (2.) that after the men had ceased work, the defendant, when the plaintiff again refused

(1) (1867) 10 Cox C. C. 592, 600.
(2) [1898] A. C. 72, 73.
(3) [1898] A. C. 1.
(4) [1901] A. C. 495.
(5) [1903] 2 K. B. 600.
(6) [1905] A. C. 239.
(7) [1919] 1 K. B. 244.
(8) [1919] 2 Ch. 129.
(9) [1920] 1 Ch. 217.

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to join the Union, stated to him that similar trouble would occur on any job on which he was employed; (3.) that Messrs. Tyler & Freeman were coerced by the withdrawal of the men, and by the statement that they would return as soon as the plaintiff was removed, into discharging the plaintiff.

Now, it is impossible for me to hold that Messrs. Tyler & Freeman were induced to dismiss the plaintiff by any statement which was made by the defendant to the plaintiff, for there is no evidence that any such statement was reported to them. So far as the plaintiff's claim to damages occasioned by his dismissal from Messrs. Tyler & Freeman's employment on November 13 is concerned, it must rest on the proposition that the firm was, by the withdrawal of the men, and the intimation that they would not return to work until the plaintiff had been removed, coerced into discharging the plaintiff. The plaintiff also contended that the defendant, by stating to him that there would be similar trouble on any other job on which he might be employed, used threats which he ought to be restrained from carrying into effect.

In all these cases it is of the utmost importance that the Court should keep in mind the fact that it is not to consider questions of policy, or whether the conduct of employers on the one hand or the workmen or their representatives on the other hand is considerate or wise or expedient. The sole duty of a judge is to consider whether the act complained of is lawful or unlawful; and it is well to remember the weighty words of Lord Herschell in *Allen* v. *Flood* (1): "I am not behind my noble and learned friend in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful."

I will deal first with the allegation that Messrs. Tyler & Freeman were coerced into discharging the plaintiff. This is not a case in which the act of the defendant in calling out the men, or intimating that they would not return before the plaintiff had been dismissed, can be described as that of an

(1) [1898] A. C. 1, 142.

intermeddler or busybody, or a mere mischief-maker: see *Conway* v. *Wade*. (1) He had full authority from the Union, of which he is secretary, to call upon the members of the Union to cease work; and there is no ground for suggesting that he was acting without authority in stating that the men would return to work as soon as the plaintiff was discharged. No one doubts that the men could have ceased work because they objected to working with the plaintiff, or were entitled to refuse to return to work with the plaintiff. Whatever may have been said at a time when there was a tendency to regard Trades Unions as illegal associations and strikes as illegal acts, or before the claim of workmen to be represented in disputes by the officials of their Unions was generally admitted, it was recognized in 1898 that an authorized official of a Trades Union could not be sued merely for inducing, or calling upon, members of his Union to cease work in support of what was believed to be in the interest of the Union. In *Allen* v. *Flood* (2) Lord Watson expressed the view that there are only two grounds on which a person who procures the act of another can be made legally responsible for its consequences—namely, (1.) If he knowingly and for his own ends induces the commission of an actionable wrong; and (2.) if, where the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, but may be to the detriment of a third party, the inducer procured his object by the use of illegal means directed against the third party; while Lord Herschell, assuming of course no breach of contract, in terms stated that the officials of the Union could not have been sued merely for calling out the members of the Union any more than the workmen themselves could have been sued for ceasing work: see too, the observations of Lord Macnaghten and of Lord James of Hereford. Lord Watson's statement has been adopted by P. O. Lawrence J. in *Davies* v. *Thomas* (3) as an expression of well-settled law. Nor do I find that the decision and the obiter dicta in *Quinn* v.

(1) [1909] A. C. 506.
(2) [1898] A. C. 1, 96, 148, 151, 180.
(3) [1920] 1 Ch. 217.

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Leathem (1) affect this part of *Allen* v. *Flood*. (2) In any case, after the passing of the Trade Disputes Act of 1906, it is impossible to argue that if an authorized Trades Union official calls out the members of his Union in furtherance of a trade dispute, he is liable to be sued merely on the ground that in doing so he interferes with the business of the employer or the employment of any person.

But it is said that in this case there was no trade dispute within the meaning of the Act, and that this was a quarrel between two Unions, and that the decision in *Valentine* v. *Hyde* (3) compels me to hold that the defendant is not protected by s. 3 of the Trade Disputes Act, 1906. A trade dispute is defined by s. 5 of the Act as " any dispute between employers and workmen, or between workmen and workmen, which is connected with " (inter alia) " the employment or non-employment of any person." In my view, there was a dispute between the employers, represented by the London section of the National Federated Electrical Association, of which Messrs. Tyler & Freeman were members, and the Electrical Trades Union on the question whether non-unionist labour in general and members of the National Association of Supervising Electricians in particular, should be employed in connection with members of the Electrical Trades Union. The workmen by their Union objected to working with members of the National Association of Supervising Electricians, or to the employment of the members of that Association on jobs on which the members of the Union were engaged. The dispute was one which was connected with the employment of members of the Association whom the Union persisted in regarding as in all essentials non-unionists. Whether the Union was right in this view appears to me to be immaterial for the purposes of this case. It is sufficient that it objected to members of the Association being employed on jobs on which members of the Union were engaged. No doubt this attitude involves a contest between the National Association

(1) [1901] A. C. 495. (2) [1898] A. C. 1.
(3) [1919] 2 Ch. 129.

and the Electrical Trades Union, as it necessarily tends to draw men away from the Association. But this consequence does not convert a trade dispute into something which is not a trade dispute. If it did, non-unionists would only have to form themselves into an association in order to prevent the operation of s. 3 of the Act in cases in which the authorized officials of recognized trades unions have called out their members in consequence of the employment of non-unionists. As in my opinion there was a trade dispute between employers and workmen, it is not necessary for me to consider whether there was also a dispute within the meaning of the Trade Disputes Act, 1906, between workmen and workmen which was connected with the employment or non-employment of any person. On this view of the facts, I do not think I am called upon to consider in detail the reasoning of the learned judge in *Valentine* v. *Hyde* (1), for, as I understand, the learned judge came to the conclusion that there was no dispute of any kind between employers and workmen; and that part of his judgment which deals with the Trade Disputes Act, 1906, had relation to the meaning of the words "a dispute between workmen and workmen connected with the employment or non-employment" of some person.

Valentine v. *Hyde* (1) was a case in which the great bulk of the workmen at a colliery belonged to four Trades Unions, and had come to the conclusion that all the men at the colliery ought to belong to one or other of these four Unions. The result was that they brought pressure to bear on the plaintiff, who belonged to a Trades Union which was not one of the four in question, to induce him to join one of the four Unions, and intimated to the employers that if the plaintiff persisted in his refusal, either he must be discharged, or the men would cease work. Whatever may be said as to the harshness of the particular case, and whatever may be the views entertained by some persons at the attitude of the majority of the workmen, the question on this part of the case, as the learned judge held that there was no dispute between employer and workmen, was whether this was a dispute between a majority

(1) [1919] 2 Ch. 129.

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of the workmen and the plaintiff which was connected with the plaintiff's employment or non-employment. The majority objected to the continuation of the plaintiff's employment if he did not become a member of the Union which they thought he ought to join. On principle, this case does not seem to differ from the case of a dispute between unionists and non-unionists, in which the unionists object to the continued employment of non-unionists because they are not members of the particular Union, for there does not seem to be any difference in principle between an objection to the continued employment of a non-unionist who refuses to join the Trade Union of his particular trade and an objection to the employment of a member of one Trades Union because he is not a member of another. In either case, the workmen object to his employment because he is not a member of the Trade Union to which they think that he ought to belong. The reasons for the objection may not be such as to command general approval, but the objection to the employment of a man who in the opinion of the workmen does not possess certain qualifications remains. The learned judge put the case of workmen objecting to work with men who are not of a particular religious or political view: the case of workmen objecting to work or being employed with enemy prisoners, or to the employment of coloured or foreign labour, might be added, where the objection is one of nationality. If any of these cases arise for decision, it may become necessary to determine whether such disputes between workmen and workmen are disputes which are connected with the employment or non-employment of any person within the meaning of s. 5 of the Trade Disputes Act, 1906. There is, perhaps, also some difficulty in saying what, on the reasoning of this portion of the judgment in *Valentine* v. *Hyde* (1), would be a dispute between workmen and workmen which was connected with the employment or non-employment of any person. If a dispute must be "connected directly with employment or non-employment, and not a dispute about some entirely different subject-matter, the non-settlement of which may result in employment or

(1) [1919] 2 Ch. 129.

non-employment, the existence, terms or conditions of which are not in contest" (1), it would seem that the common difference between workman and workman on the subject of non-unionist labour is excluded from the operations of ss. 3 and 5 of the Act; for the objection is not to their employment simpliciter, but to their employment because or if they do not join the Union. As I gather, the suggestion is that in that case the quarrel with the men is that they will not join the Union, and the quarrel with the employer is that he employs them although they will not join the Union. It may be doubted whether the true view is not that both quarrels are disputes which are connected with employment; but as I am of opinion that in this case there was a dispute between employers and workmen which was connected with the employment of the plaintiff and others who were in a similar position, I have not to decide what is the meaning of the Act in relation to disputes between workmen and workmen which are connected with employment.

But then it was contended that if there was a trade dispute in this case s. 3 does not afford any protection to the defendant, because by threats and coercion he induced or compelled Messrs. Tyler & Freeman to dismiss the plaintiff: see *Conway* v. *Wade*. (2) In support of this contention, much reliance was placed on *Valentine* v. *Hyde*. (3) I have, however, to consider the question whether there have, in fact, been any threats or coercion directed against Messrs. Tyler & Freeman for which the defendant can be held liable to an action. The men were called out, and subsequently, when the defendant was asked whether they would return if the plaintiff was discharged, he answered in the affirmative. It appears to me to be impossible to treat this as a threat which is a sufficient basis for an action, even if it be construed as a statement that the men would not return if the plaintiff were not discharged. The defendant could only answer in this way if he answered at all. He was asked for information, and he gave it. But whatever be the threats for which an action

(1) Per Astbury J. in *Valentine* v. *Hyde*, pp. 151, 152.

(2) [1909] A. C. 506.

(3) [1919] 2 Ch. 129.

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will lie, this in my opinion was not one for which the defendant could be sued by the plaintiff, or by Messrs. Tyler & Freeman. I am also unable to hold that the defendant used such coercion against Messrs. Tyler & Freeman as to render him liable in damages to the plaintiff.

"Coercion" is a word of ambiguous import. In one sense, anyone is coerced who under pressure does that which he would prefer not to do; but a reluctant debtor who pays under stress of proceedings is not coerced within the legal meaning of the word. Messrs. Tyler & Freeman had to choose between carrying out their contract with the Watford Manufacturing Company without the plaintiff or keeping the plaintiff and losing the contract; and they considered that their interests lay on the side of discharging the plaintiff. The pressure which resulted in this decision was not, in my opinion, coercion of the character which constitutes a ground of action: see observations of Lords Watson and Herschell in *Allen* v. *Flood*. (1) If it were, there would be few strikes or lock-outs in which either employers or workmen or both could not say that they were coerced. I am not sure that the test whether the employer would have acted in the particular way of his own freewill, which seems to have been applied in *Valentine* v. *Hyde* (2), is altogether satisfactory. Freewill has been much discussed in the region of metaphysics, and lawyers might be content that the discussion should not extend to the realm of law. The test may be equivalent to an inquiry whether the employer would have acted in a particular way if the particular motive or inducement had been absent. But the fact that he would have acted differently if the circumstances had been different does not show that in adopting the course in question he was acting under coercion or compulsion. Such a test would be inconsistent with the views expressed by several of the learned Lords in *Allen* v. *Flood* (1), and would admit as coercion any act which induced a man to do something which he is reluctant to do. "Coercion" involves something in the nature of the negation of choice; and I respectfully adopt the view of Lord Watson in *Allen* v. *Flood* (1),

(1) [1898] A. C. 1, 99, 125. (2) [1919] 2 Ch. 129.

that an employer cannot properly be said to be coerced if, having two alternative courses presented to him, he follows that course which he considers conducive to his own interests. In my opinion, there was not in this case any coercion of Messrs. Tyler & Freeman for which either that firm or the plaintiff could sue the defendant.

There remains the question whether the defendant threatened the plaintiff in such a way as to entitle the plaintiff to relief in this action. There are two possible threats on which the plaintiff relies: (*a*) that before withdrawing the men the defendant told the plaintiff that as the plaintiff refused to join the Electrical Trades Union he would have to call the men off the job, and that they would not return so long as he remained; (*b*) that after the men had ceased work, the defendant, when the plaintiff refused to join the Union, stated to him that similar trouble would arise on any job on which he was employed. Threats and coercion are not protected by s. 3 of the Trade Disputes Act, 1906: *Conway* v. *Wade*. (1) But what is a threat, and what kind of threat is actionable? We have been instructed on high authority to have regard to the difference between a threat and a warning: *Conway* v. *Wade* (1) and *Santen* v. *Busnach*. (2) We have been reminded that the same words may, according to circumstances, constitute either a threat or a warning; and that while nothing may be capable of being said against the wording of a notice, it may be given in such a manner and in such circumstances as to constitute a threat: see *Santen* v. *Busnach* (2) per Vaughan Williams L.J. In the argument in this last case it was suggested that a warning is an intimation that in certain circumstances a third party intends to do some act, and that a threat is an intimation that in certain circumstances the person who gives the intimation will do some act, or procure it to be done. But this distinction does not appear to have been adopted; nor would it be of any great assistance, as it would leave in the class of threats many intimations to which no legal exception could be taken. I am not able to see that any great advantage is to be derived from the distinction

(1) [1909] A. C. 506. (2) 29 Times L. R. 214.

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between a threat and a warning. The question depends on what was said or written, and not on the favourable or unfavourable nature of the epithet by which the words may be described. The question is whether the defendant has employed unlawful means; and that question is not, to my mind, to be solved by saying that his words amount to a threat. It appears sometimes to be thought that a mere threat in itself gives a cause of action; but this is not so. An indignant parent cannot be sued for threatening his son that he will be disinherited if he does not reform, even although the intimation may lack nothing in force and angry vigour. The reason is, that he is entitled to disinherit his son, if he thinks fit; and he does not commit any legal wrong in informing his son of his intention, with such emphasis as he may consider desirable. Workmen are admittedly entitled to cease work for any reason, good, bad or indifferent; and employers are entitled to decline to continue workmen in their employment for any reason, whether good or bad. To my mind, it would seem to be a very strange inconsequence that while the workmen can cease work without the possibility of legal objection, they cannot in a body or by one or more of themselves, or by one of the officials of their Union, inform the employers of the fact that they propose to cease work, and of their reasons for doing so, without the risk to the communicant of being sued for using threats or coercion. No legal exception can be taken to the fact of the strike; yet it is sometimes contended that an action will lie for intimating to the employers that in certain circumstances that which the men are entitled to do will be done. If this be the law, nothing could be more inconvenient for both employer and workman, as the tendency would be to call the strike first, without waiting for negotiations which would give an opportunity to the employers to consider whether it was to their advantage to make the required concessions; and certainly those who objected to the so-called threat would be the first to protest against a strike which was made without due intimation that it was about to take place. If this were the law, it would seem that an employer who announced to his unionist workmen that if they did not

within a limited time leave their Union he would dispense with their services, would also be liable for an action for threatening them. A threat is only an intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like. But it is impossible to say whether such a threat is or is not lawful until it has been ascertained what it is that is threatened to be done. If the threat is to use violence to person or property, it is obviously an intimation that the threatener intends to use unlawful means for the purpose of attaining his end: and no one would doubt that a threat to do that which is unlawful cannot be defended. Where the threat is part and parcel of a conspiracy or unlawful combination, it may be affected by the illegality of the conspiracy. But omitting cases of conspiracy or combination, I do not understand the legal basis for contending that it is unlawful for a man to threaten to do merely that which he is entitled to do. The act itself is immune from attack, yet an intimation that it will be done is to be a ground of liability. It may be that the idea is due to the belief that the threat is a menace or intimidation, and that it is unlawful, because it puts unlawful pressure upon the person who is subjected to it. If a threat amounts to intimidation or a menace of violence it cannot be defended; but assuming that it does not, the question remains whether it does in fact exercise pressure of an unlawful kind. Omitting cases of conspiracy or combination, I venture to doubt whether the pressure of a mere statement that the speaker intends to do something which he is legally entitled to do if the man to whom he is speaking does not adopt a particular course, can be unlawful pressure. If it is, then the case of the butler who obtained the dismissal of the cook by threatening to leave if she was not discharged is a more serious case than Lords Herschell and Shand in *Allen* v. *Flood* (1) considered it to be. In my opinion, if I may without presumption say so, the judgments of the majority of the learned Lords in *Allen* v. *Flood* (1) are both sound law and sound sense, and have not been seriously affected by *Quinn*

(1) [1898] A. C. 1.

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v. *Leathem* (1) and later cases. It was pointed out in *Quinn* v. *Leathem* (1) that the actual decision in *Allen* v. *Flood* (2) was that an act lawful in itself is not converted by a bad or malicious motive into an unlawful act; and it was suggested that beyond this the judgments were obiter dicta: Lord Halsbury pointing out that the hypothesis of fact upon which *Allen* v. *Flood* (2) was decided by a majority was that the defendant had neither uttered nor carried into effect any threat at all. But the consideration of the question of threats by the majority in *Allen* v. *Flood* (2) was not a gratuitous discussion of an irrelevant topic. The judges who were asked to advise the House of Lords had this question propounded to them: Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury? Some of the learned judges, notably Hawkins J., in a passage which was exposed to very destructive criticism by Lord Herschell, were of opinion that the defendant had used threats, intimidation and coercion. The three learned Lords who formed the minority in *Allen* v *Flood* (2) were of opinion that the defendant by threats had intimidated and coerced the employer. In these circumstances, it is not surprising that the majority of the learned Lords in *Allen* v. *Flood* (2) found it necessary or thought it desirable that the opinion which had been expressed on the subject of threats, intimidation and coercion should not pass unchallenged. If in the event some of the observations made by them in the course of their judgments appear to be beyond the limits of strict necessity, the same remarks may be made of their critics in *Quinn* v. *Leathem*. (1) Lord Watson laid down that when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, then if it is to the detriment of a third party, the inducer may be held liable if he has procured his object by the use of illegal means directed against that party. He went on to express his view that the men were entitled to strike, and to inform the employer that they proposed to strike because they objected

(1) [1901] A. C. 495. (2) [1898] A. C. 1.

to the employment of the two plaintiffs, either by their own mouth, or by their representative, and that the supply of such information was not coercion. He obviously thought that if the men, or the men's representatives, truthfully told the employers that the men would strike, as they were entitled to do if the plaintiff was not discharged, that was not a threat or coercion for which any action would lie. Lord Herschell in his very powerful speech, after saying that the words "threat, coercion and intimidation" were often applied in popular language to circumstances which were quite lawful, and that they meant no more than that the so-called threat put pressure, perhaps extreme pressure, on the person to whom it was addressed, pointed out that everything depended on the nature of the statement by which pressure was exercised, and that the law could not regard the act differently because you chose to call it a threat or coercion, instead of an intimation or warning. He then pointed out that it was perfectly lawful for the men to cease work and refuse to work in company with the plaintiffs; that Allen or the authorities of the Union would have acted within his or their rights if he or they had called out the members of the Union; that the plaintiffs would have had no cause of action if the men had ceased work on their own motion, or because they had been called out, and the employers to secure their return had discharged the plaintiffs; and he then added (1): "I am quite unable to conceive how the plaintiffs can have a cause for action, because, instead of the ironworkers leaving, either of their own motion or because they were called out, there was an intimation beforehand that either the one or the other of these courses would be pursued." The passage in Lord Macnaghten's judgment (2) appears to point in the same direction, while Lord Shand (2), in dealing with actionable threats, expressed the view that such threats could only be "threats of violence, intimidation, obstruction or the like—threats which may be described as menace which improperly affects freedom of action in the person who is induced to act or to refrain from acting"; and added these words: "There was no

(1) [1898] A. C. 130. (2) [1898] A. C. 1, 151, 165.

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threat of the nature of menace so as to amount to the use of illegal means to induce the employers to act—no threat to do anything beyond the exercise of their legal right. A master who warns his servant that a repetition of certain faults will result in dismissal may be said to use a threat; but he is not only acting lawfully, but in most cases is to be commended for so doing in place of giving an instant dismissal." In *Allen* v. *Flood* (1) there was not any case of conspiracy or combination; and the observations of the learned Lords were obviously directed to a case in which there was no suggestion of combination.

Quinn v. *Leathem* (2) was a clear case of conspiracy or unlawful combination, and the case was decided on that ground. Lords Halsbury, Macnaghten and Shand held that there was a conspiracy or unlawful combination; and distinguished *Allen* v. *Flood* (1) on that ground, Lord Shand also pointing out that in *Allen* v. *Flood* (1) the purpose of the defendant was to promote his own trade interest, which he was entitled to do, although injurious to his competitors; while in *Quinn* v. *Leathem* (2) the purpose of the defendants' combination was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing his own interests. Lord Brampton, who as Hawkins J. was one of the judges who were consulted in *Allen* v. *Flood* (1), pointed out that the distinction between *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2) was that in the latter case the real and substantial cause of action was an unlawful conspiracy to molest the plaintiff in carrying on his business. Lord Lindley, it is true, is in apparent difference with Lord Herschell, as he states that if in *Allen* v. *Flood* (1) Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike or threatening to make them strike, by calling them out when they do not want to strike, he (Lord Lindley) was unable to concur with him. But even here, it will be observed that Lord Lindley is postulating the case of a Trade Union official who compels

(1) [1898] A. C. 1. (2) [1901] A. C. 495.

members of his Union to strike when they do not want to do so. The same case is apparently put again in the sentence in which his Lordship says (1): "A threat to call men out given by a Trade Union official to an employer of men belonging to the Union and willing to work with him is a form of coercion, intimidation, molestation or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification." Here, again, the hypothesis is, that the members of the Union are desirous of continuing to work for the employer, and that they, as well as the employer, are coerced, intimidated, molested or annoyed by the Trades Union official. But even in such a case apparently Lord Lindley recognized that there might be an adequate defence. He does not, apparently, deal with the simple case of an authorized Trades Union official calling a strike of the members of the Union in pursuance of the accepted policy of the Union in relation to a trade dispute, or with the case of the official informing the employer, in the case of such dispute, that the members of the Union would be called out if the dispute were not settled.

My attention was called to the well-known observations of Romer L.J. in *Giblan's Case* (2), to the effect that if a person who by virtue of his position or influence has power to carry out his design, sets himself to the task of preventing and succeeds in preventing a man from obtaining or holding employment in his calling to his injury, by reason of threats to or special influence upon a man's employer or would-be employers, and whose design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered. Here the Lord Justice is dealing with the question of liability, where there is no conspiracy or unlawful combination; but it will be observed that this dictum as to liability in such a case assumes that the threat is employed for the purpose of giving effect to an unlawful or unjustifiable purpose.

(1) [1901] A. C. 538. (2) [1903] 2 K. B. 600.

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In *Santen* v. *Busnach* (1) two members of a Trade Union informed their employer that their Union had instructed its members to leave his employment if the plaintiff refused to join the Union. The Court of Appeal came to the conclusion that there was no threat, but only a warning. In this case the defendants and the other employees were entitled to cease work, and the defendant informed the employers of their intention.

In *Gaskell* v. *Lancashire and Cheshire Miners' Federation* (2) the Court of Appeal, without hearing argument for the respondents, came to the conclusion that there was no threat, and consequently, the question whether, if there had been a threat, it was actionable, was not considered. I respectfully agree that " a single person, or a body of persons, will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business ": see *Pratt* v. *British Medical Association*. (3) The question is whether unlawful means have been employed. It is not, as has been already pointed out, every statement which may be called a threat that is unlawful; and for myself, I find it impossible to hold that in a simple case where there is no question of conspiracy or unlawful combination, a firm, and, if you please, emphatic, statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is a threat for which the speaker can be held liable at law. Whether it be called a threat or a warning, it is a statement by the person who makes it of an intention to act on his legal rights, made for the purpose of inducing the other to exercise his legal rights in a particular direction.

Now, the first alleged threat made by the defendant to the plaintiff was that at the first interview, after the plaintiff had refused to join the Electrical Trades Union, the defendant said that he would have to call the men off the job, and that

(1) 29 Times L. R. 214. (2) (1912) 28 Times L. R. 518.
(3) [1919] 1 K. B. 244, 260.

they would not return so long as the plaintiff remained. As I have already said, if the defendant, without speaking to the plaintiff, had called out the men, he could not, in my opinion, have been sued, either by Messrs. Tyler & Freeman or by the plaintiff, as his act would not have been an illegal one. I am not, for the reasons which I have given, prepared to hold that he could be made liable to the plaintiff for telling the latter that he intended to do that which he was lawfully entitled to do. It may be that some would call it a threat; others might say that it was only right that the plaintiff should have a full opportunity of appreciating the circumstances before he made up his mind. But whether it be called a threat or a warning, or whatever other description be given of it, it was in effect a statement that the defendant would adopt lawful means for the purpose of giving effect to his Union's lawful policy; and I am not prepared to hold that the defendant can be made liable for doing so.

It may be observed also that this threat, if it was a threat, was addressed to the plaintiff and not to the plaintiff's employers. It did not cause the discharge of the plaintiff, as it was not brought to the attention of his employers, Messrs. Tyler & Freeman, and it was not a statement which amounted to a threat affecting the future employment of the plaintiff. For this reason, also, I am unable to see how this threat, if threat it be, can supply the plaintiff with a cause of action.

This leaves for consideration the defendant's statement at the second interview, that there would be similar trouble on any other job on which the plaintiff was engaged. This statement had no part in the discharge of the plaintiff from Messrs. Tyler & Freeman's employment; but it is said it is a threat that the plaintiff would be followed, tracked and persecuted. The words are obviously capable of two interpretations. They may mean that the authorities of the Union would see to it that the plaintiff should be the subject of persistent persecution; or they may be a statement for the plaintiff's consideration of what obviously might be expected to occur. This interview was not marked by angry or violent language. The employers and the

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men's Union had come to grips on the question of the employment of members of the National Association of Supervising Electricians. There had been at least one strike by the Union men on this subject. This objection to the employment of members of the National Association of Supervising Electricians was part of the settled policy of the men's Union; and the London section of the Employers' Association had declined to yield on this question, and had called upon its members to resist the Union's endeavour to give effect to its policy. In these circumstances, it seems obvious, and it must have been obvious to everybody concerned, that troubles were awaiting the plaintiff and other members of the National Association of Supervising Electricians and those employers who were determined to retain their services; and that as the question had become active and burning, it was very probable that it would arise wherever the plaintiff was employed together with members of the Electrical Trades Union, if it became known to the members or officials of the Union that he was not a member of the Union.

The facts may strike different minds in different ways; but the conclusion to which I have come is that the defendant endeavoured to persuade the plaintiff to become a member of the Electrical Trades Union, and in course of doing so pointed out that if the plaintiff persisted in refusing to do so he would inevitably be exposed to similar difficulties in the future. I do not think that in making the observations in question the defendant did threaten the plaintiff. I do not consider the question whether, if it was a threat, the defendant is liable to be sued for threatening to give effect to the policy of his Union in an existing trade dispute between employers and the Union. That is a question which, on my view of the facts, it is not necessary to answer. The result, therefore, is that, in my opinion, this action fails.

Solicitors for the plaintiff: *Turner & Co.*
Solicitor for the defendant: *W. J. Lark.*

R. M.

POLE-CAREW *v.* WESTERN COUNTIES AND GENERAL MANURE COMPANY, LIMITED.

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Jan. 22, 23, 26, 27, 28, 29; *Feb.* 2, 20.

[1919. C. 741.]

Landlord and Tenant—Chattels—Fixtures—Trade Fixtures—Sulphuric Acid Plant—Tenant's Right of Removal—Lease—Covenant to yield up "erections and buildings in good repair"—Surrender and Creation of New Tenancy.

A company from the year 1857 until the year 1912 continuously occupied and carried on the business of manufacturers of artificial manure and sulphuric acid on premises held by them under three successive leases, being (*a*) a lease for lives granted in 1857, (*b*) a lease for lives granted in 1868 in consideration of the surrender of the 1857 lease and including a small additional piece of land, and (*c*) a lease for fourteen years, but determinable by the company on six months' notice, granted in 1912 in pursuance of an agreement made in 1910 (though subsequently varied in certain respects) immediately after the expiration of lease (*b*) by the cesser of the last life therein mentioned. Leases (*b*) and (*c*) contained a covenant to repair and yield up in repair the demised premises, including any existing or future "erections" or "buildings." The 1912 lease also contained a covenant to insure against damage by fire and to reinstate out of the policy moneys. Upon the premises the company, at their own expense, erected various ordinary buildings for the purposes of their manure manufacture, and also a complete set of sulphuric acid making plant on the "chamber process," consisting of pyrites burners, four reaction chambers, and two so-called "towers" usually known as a "Glover tower" and "Gay-Lussac tower." The "towers" and the three chambers were so erected before the 1868 lease, but the fourth chamber was put up between 1868 and 1910. Three of the chambers were of great size (approximately 140ft. long, 20ft. wide, and 14ft. high), and each consisted of a rectangular leaden vessel supported by and enclosed in a substantial wooden framework, the lowest part of which consisted of a series of beams resting mainly on but not fixed to stone walls and pillars, except in the case of one chamber, which rested almost entirely on unfixed iron columns. The fourth chamber was really an open tank standing on a wooden platform upon beams themselves rested on the stone walls and pillars. Each of the "towers" was in effect an upright "chamber" enclosed in a wooden framework and supported by four wooden posts having iron "shoes" and resting by their own weight on a necessary foundation. In 1916 a fire occurred on the premises, and shortly afterwards the defendant company determined their lease and removed all that was left of the materials of the chambers and towers. In an action by the lessor for damages for breach of the covenants in the 1912 lease:—

Held (affirming the decision of Sargant J.), that the chambers and the towers must, having regard to all the circumstances, be regarded as

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integral portions of one composite building permanently annexed to the freehold, and not as chattels or as tenant's fixtures, and that they were within the express terms of the covenant in the 1912 lease to repair and yield up.

Held, also, by Warrington L.J. (Lord Sterndale M.R. and Younger L.J. reserving their opinion on this point), that even if during the term of the 1857 lease the three chambers then existing and the towers had been removable as tenant's fixtures, yet on the principle of *Leschallas* v. *Woolf* [1908] 1 Ch. 641 the effect of the grant and acceptance of the 1868 lease was to put an end to any right of removal.

APPEAL from a decision of Sargant J.

The action was brought by the plaintiff against the defendant company for (1.) a declaration that the defendants were liable to make good all wants of repair and to reinstate certain premises at Torpoint, in the county of Cornwall, demised to them by two leases, dated respectively January 28, 1868, and March 16, 1912; (2.) damages for breaches of covenants in the same two leases; (3.) an account of moneys received by the defendants in respect of insurances effected in respect of the demised premises, and for incidental relief.

The following statement of facts is taken substantially from the judgment of Warrington L.J.

The plaintiff was the lessor and the defendants were the lessees under a lease dated March 16, 1912, of a plot of land at Torpoint, in Cornwall, with the manure manufactory and other buildings thereon.

In the year 1916 a fire occurred on the demised premises causing very considerable damage. Amongst the property damaged or destroyed was a series of structures employed in the manufacture of sulphuric acid, an ingredient of artificial manures, the preparation and sale of which was the business of the defendant company. The remains not absolutely destroyed of these structures were removed by the defendants and they had failed either to make good the damage to them caused by the fire or to restore what they had removed.

The dispute was whether these structures were within the terms of the covenant, the defendants insisting that they were either chattels or at least trade fixtures removable by the tenants, and that in either case they are not within the covenant.

The structures in question were three acid chambers, a tank, two towers and a lean-to shed, and they constituted together an apparatus for the manufacture of sulphuric acid. Each of the several elements of the apparatus (except perhaps the lean-to shed, which was of trifling importance) played an essential part in the process of manufacture, and would be of no use by itself.

The defendant company was incorporated in the year 1856, with the object of manufacturing artificial manure, and shortly afterwards acquired the remainder of a term created in 1849 over the greater part of the land afterwards comprised in the leases of 1868 and 1912. In 1857, on the expiration of the term created by the lease of 1849, a new lease was granted to the defendants. There appeared at that time to have been no building on the ground except one described as having formerly been used as a varnish factory. The term under this lease of 1857 was for ninety-nine years or three lives, one of which was the late King Edward VII., then Prince of Wales. This lease was taken and granted in order that the land might be used in the defendants' business.

Before the grant of the lease of 1868 the defendants acquired a short tenancy of a small piece of land adjoining the land comprised in the lease of 1857, and this piece of land was included in the demise of 1868.

On the land of which they thus became the tenants the defendants proceeded to erect for the purposes of their manure manufactory certain buildings as to which no question arose, and they also placed thereon the structures in dispute except one of the acid chambers and the lean-to shed, which came into existence after 1868. At the time of the construction of this last chamber one of the three then existing chambers was converted into an open tank. From this time until their destruction in 1916 the structures in question remained unaltered.

By the lease of 1868 in consideration of the surrender by the defendants of the lease of 1857 and in consideration of the rents heriots covenants and rights thereinafter reserved and contained the then lessor (the predecessor of the plaintiff)

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demised to the defendant company "all that manufactory (being a manure factory) with the storehouses machine houses sheds yard quay and premises now in the occupation of the said company." The dimensions and boundaries were then specified and the premises were stated to be more particularly delineated by a plan in the margin. The plan, in his Lordship's opinion, threw no light on the present question. The term was for ninety-nine years if the same three persons who were named in the lease of 1857 or any of them should so long live. The annual rent was 26*l.* 10*s.*, and a heriot was reserved payable on the falling in of each of the three lives. The covenant to repair was in the following terms: "And also shall and will repair maintain and keep the said manufactory and premises in good and substantial repair and condition as well in houses walls roofs rails gates fences stiles drains sinks and sewers and any buildings and erections now or hereafter during the said term standing or being on the said demised premises or any part thereof as also every other part thereof during the said term and at the end or other sooner determination thereof shall leave and yield up the same in such good and substantial repair and condition." There was another covenant relating to "any building now erected or hereafter to be erected on the said hereby demised premises."

King Edward VII. was the survivor of the three persons named in the lease. He died on May 6, 1910, and the term thereby created then came to an end after a duration of forty-two years.

The defendants remained in possession of the demised premises, and as the result of letters passing between the parties in July, 1910, the plaintiff in whom the property was then vested agreed to grant and the defendants agreed to accept a lease for fourteen years at a rent of 150*l.* on condition of their putting and keeping the premises throughout in good and tenantable repair. The defendants remained in possession paying rent at the new rate as from May 6, 1910. In February, 1912, the agreement was modified by providing that the new term should commence on September 29, 1911,

and that the defendants should have the option of determining the lease on giving six months' notice.

The lease executed in pursuance of this agreement was dated March 16, 1912. By it the plaintiff demised to the defendants for fourteen years from September 29, 1911, "All that plot of land situate at Torpoint in the Parish of Antony in the County of Cornwall containing 58,815 square feet statute measure or thereabouts together with the manure manufactory and other buildings now standing and being thereon which said plot of land manufactory and premises are particularly delineated by the plan attached hereto and thereon coloured pink." The plan was on a small scale, and in his Lordship's opinion no reliance could be placed on it as assisting the construction of the document. The covenant to repair was in the following terms: "And also will at their own expense forthwith put the said buildings in good and substantial repair and thereafter as occasion shall require during the said term well and sufficiently repair maintain paint glaze pave empty cleanse amend and keep in good and substantial repair all the erections and buildings now standing and all future erections and buildings to be erected and built on the said demised plot of land and the drains thereof and at the end or other sooner determination of the said term will quietly yield up the same in good and substantial repair together with all things which at any time during the said term shall be in any way fastened to the said demised premises or any future erections to be made thereon and shall come under the denomination of landlord's fixtures." The lease contained a covenant against the alteration in the elevation of "the buildings hereby demised or any future erections to be built on the said plot of land," or the erection thereon of any further "erections or buildings" without the consent of the lessor, and a covenant not to cut or injure "any of the principal timbers or walls of the buildings from time to time standing or being on the said ground." There were also covenants to insure buildings and to expend moneys recovered under any policy of insurance in "repairing and rebuilding the premises." The

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defendants were to have the option of determining the lease on giving six months' notice in writing expiring on one of the regular quarter days.

After the fire the defendants exercised their option, and quitted the premises in May, 1917, having previously removed the debris of the structures above referred to.

The structures in question were two acid chambers conveniently referred to as Nos. 1 and 2, a tank (previously to the alteration above mentioned an acid chamber) referred to as No. 3, another acid chamber with the lean-to shed attached referred to as No. 4, and two towers. The whole together formed a single apparatus for the manufacture of sulphuric acid, an essential ingredient in the preparation of artificial manures. The acid was produced from the combustion of iron pyrites in burners adjoining the apparatus. The gases thus formed passed into one of the towers and thence into the acid chambers, where they underwent a chemical reaction as the result of which the acid was formed; the residuary gases then returned into the other tower undergoing further changes, and again passed through the first tower and the acid chambers and so on. There was thus a constant circulation provided for by pipes connecting the various portions of the apparatus.

It is unnecessary to state in any detail the construction of the several structures mentioned above. The lower parts of Nos. 1, 2 and 3 consisted of one area surrounded by enclosing walls pierced with windows and doors at intervals. In the case of Nos. 1 and 2 the walls on the longer sides were finished with a wall plate, sometimes improperly, as his Lordship thought, referred to as a beam, laid in mortar, and providing a level surface for the ends of the joints. The area within the walls was traversed from end to end by beams resting on the end walls and supported along their length partly by brick piers and partly by iron columns. The walls and the brick piers were admittedly attached to the soil. The columns were of iron, and hollow, and they rested on the soil without attachment. The beams were nailed to a movable cap resting on the top of the column and held in

place by a boss dropped into the hollow column itself. On the beams and wall plates rested joists to which floor boards were nailed, and on this base a superstructure of wood and lead was erected surrounded by joists carrying a roof. The ends of the beams were described by the defendants' witness Northcott as going "through" the walls, by which his Lordship understood that they did not merely rest on the top but lay in spaces left for them in the walls or that the top part of the wall was built round them. No. 3, as originally constructed, was, for the present purpose, in substantially the same position as Nos. 1 and 2. The beams however were laid transversely to the longer axis of the area enclosed by the stonework, and were supported in the middle by a single row of iron columns such as described above. Their ends on the side furthest from Nos. 1 and 2 projected from the wall sufficiently far to allow a passage way outside the chambers. This chamber was afterwards converted into an open tank by removing the superstructure, leaving only the floor with a shallow tray or tank of lead resting upon it. At the same time No. 4 was constructed. This was identical with Nos. 1 and 2 except that the beam nearest to the then existing structures was laid on the projecting ends of the beams supporting No. 3. Two other beams were supported only by iron columns.

The lean-to shed was only a slanting roof fixed at the top to the superstructure of No. 4 and with its bottom resting on iron columns. The columns themselves merely rested on the ground. It was admitted that the lean-to shed "stands or falls with No. 4."

The enclosed areas beneath Nos. 1, 2 and 3 were used as storehouses to which the superstructure afforded an efficient covering.

Sargant J. said with regard to the acid chambers that if one looked at the size, permanence, and general character of the structure, and observed the absence of any definite line of demarcation or division, and of any unity in the upper structure as distinguished from the lower, he thought one was driven to the conclusion that the whole structure formed

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one single unit and was in the nature of a building; that it was not a chattel; that it was a fixture; and that the lower portion of this unit being embedded in the land by ordinary foundations, it could not be considered a tenant's fixture and must be considered from the beginning as being something permanently annexed to the freehold of the nature of a building. The towers were more in the nature of separate units, and were more easily separable from the foundation on which they rested than the acid chambers. They could hardly be described as chattels, but it seemed doubtful whether they were tenant's fixtures or not. The cases of *Leschallas* v. *Woolf* (1) and *Slough Picture Hall Co.* v. *Wade* (2) had, however, laid down the proposition that in the case of a surrender of a lease and the grant of a new lease there was prima facie a loss by the tenant of his right to remove the tenant's fixtures, a right which he might have had under the original lease. Having regard to the surrenders and regrants of leases in the present case it appeared to fall within that rule. There was the further point that by the lease of 1912 "a plot of land . . . . with the manure manufactory and other buildings now standing and being thereon" was demised, and there was a covenant to keep the "buildings and erections" in repair and so to yield them up. On a fair construction of those words it appeared to his Lordship that they might be held to cover both the acid chambers and the towers.

The defendants appealed. The appeal was heard on January 22, 23, 26, 27, 28, 29; February 2, 1920.

Upjohn K.C. and *Gover K.C.* for the appellants. First, it is submitted upon the evidence that the things in question are chattels. They are not let into the ground nor attached by bolts or in any other way. They are merely structures resting by their own weight upon some kind of support which is let into the ground. They therefore retain their character as chattels.

If they are not chattels then it is submitted they are ordinary trade fixtures removable by the tenants during

(1) [1908] 1 Ch. 641. (2) (1916) 32 Times L. R. 542.

the currency of the term and for a reasonable time after its termination. They are not therefore included in the covenants contained in the leases, those covenants being limited to landlord's fixtures.

On the evidence it is submitted that these structures from the beams and joists upwards are chattels ; that they were put up by the defendants to enable them to carry on their trade, and that so far from the defendants intending them as a gift to the landlord they did everything in their power to prevent them from becoming so. It can make no difference if in placing a heavy thing on the ground you bring up the ground and place the thing upon brick piers and joists. Sargant J. has held that these structures formed one building from the foundation to roof, and therefore part of the freehold, and that they were accordingly neither chattels nor tenant's fixtures. The fact that a beam rests on mortar cannot make it a fixture. The beams here rested on the brickwork, not on wall plates or mortar. The general rule with regard to fixtures is that that which rests only by its own weight on the soil is not part of the freehold, and is therefore not a fixture. The only qualification of this rule is that as between mortgagor and mortgagee or tenant for life and remainderman you may look to see the intention with which the mortgagor or tenant for life put up the thing on the premises. There is however no case as between landlord and tenant which impinges on the rule that that which rests by its own weight on the soil is not a fixture.

The cases on the subject fall into two groups : (1.) where the Court has had to consider whether large things standing on the ground or on supports are chattels ; and (2.) exceptional cases where chattels in the ordinary sense have been treated as notionally attached to the soil, and therefore as fixtures.

The first case in which the definition of fixtures was authoritatively laid down was *Turner* v. *Cameron*. (1) In that case Mellor J. adopted the following definition taken from Amos and Ferrand on Fixtures, Part I., chap. 1, p. 2 : " It is necessary, in order to constitute a fixture, that the

(1) (1870) L. R. 5 Q. B. 306, 311.

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article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land and brought in contact with it: the definition requires something more than juxtaposition; as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should have been cemented or otherwise fastened to some fabric previously attached to the ground."

The following articles or structures have been held not to be fixtures: a wooden windmill resting upon a brick foundation: *Rex* v. *Londonthorpe* (1); *Reg.* v. *Otley* (2); a barn resting upon pattens and blocks of wood lying upon the ground: *Elwes* v. *Maw* (3); vats supported by and rested on brickwork and timber, but not fixed in the ground: *Horn* v. *Baker* (4); a wooden barn kept in position by its own weight: *Wansbrough* v. *Maton* (5); a granary resting by its mere weight on staddles built into the land: *Wiltshear* v. *Cottrell.* (6) *Mather* v. *Fraser* (7) is the first case in which a movable was treated as a fixture. There steam-engines and boilers and mill-gear fastened in a mill and not standing merely by their own weight were held as between a mortgagor and mortgagee to be fixtures. In *Hutchinson* v. *Kay* (8) it was held that upon the sale or mortgage of a mill, looms used in the mill, not attached to the freehold, did not pass under the general words, "machinery belonging to the mill." When machinery becomes a fixture, parts of it which are not fixed, but which are essential to its working, are fixtures also: *Ex parte Astbury.* (9) In *Bellamy* v. *Davey* (10) incomplete tanks not fixed to the soil but too heavy to move were held not to be fixtures.

[WARRINGTON L.J. That case has been doubted in *Pritchett Co.* v. *Currie.* (11)]

Not on this point. These cases are all examples of the first

(1) (1795) 6 T. R. 377.
(2) (1830) 1 B. & Ad. 161, 165.
(3) (1802) 3 East, 38, 55.
(4) (1808) 9 East, 215, 222.
(5) (1836) 4 Ad. & E. 884.
(6) (1853) 1 E. & B. 674.
(7) (1856) 2 K. & J. 536, 559.
(8) (1857) 23 Beav. 413, 417.
(9) (1869) L. R. 4 Ch. 630.
(10) [1891] 3 Ch. 540.
(11) [1916] 2 Ch. 515.

group of cases. As to the second group of cases where the Court has held that a chattel may notionally be treated as a fixture, *Moody* v. *Steggles* (1) shows that there must be exceptional circumstances to bring a case within this group. In *Holland* v. *Hodgson* (2) looms affixed to the flooring of a mill which could be easily removed without any serious damage to the flooring were held to pass by a mortgage of the mill as part of the realty.

In *D'Eyncourt* v. *Gregory* (3) it was held that tapestry, pictures in panels, frames fitted with satin and attached to the walls; and also statues, figures, vases, and stone garden-seats, purchased and placed by the testator in that case, which were essentially part of the house, or of the architectural design of the building or grounds, however fastened, were fixtures, and could not be removed. This case illustrates the peculiar circumstances required to make chattels notional fixtures. See also *Monti* v. *Barnes* (4), where dog-grates substituted for fixed grates were held to be part of the house: and *Reynolds* v. *Ashby & Son.* (5)

Further it is submitted that the structures in question were not affected in their character of tenant's fixtures by reason of any dealings between the parties as evidenced by the surrenders and fresh leases which were executed in 1868 and 1912. These structures are not like brick buildings let into the ground, which of course, although erected for the purposes of the tenant's trade, cannot be regarded as trade fixtures: *Whitehead* v. *Bennett.* (6)

Naylor v. *Collinge* (7) shows that although a thing may be called an erection or building, yet if it be not let into the soil, but rests on blocks of wood or stone, etc., it is not an erection or building within the meaning of a covenant in a lease to give up in repair all "buildings and erections." There is nothing in this case to take the structures in question out of the general rule established by the cases already cited.

(1) (1879) 12 Ch. D. 261.
(2) (1872) L. R. 7 C. P. 328.
(3) (1866) L. R. 3 Eq. 382, 386.
(4) [1901] 1 K. B. 205.
(5) [1904] A. C. 466.
(6) (1858) 27 L. J. (Ch.) 474.
(7) (1807) 1 Taunt. 19.

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[They also referred to *Jenkins* v. *Gething* (1); *Mears* v. *Callender*. (2)]

With regard to the other point it is submitted that such things as are in question here are excluded from the new leases. This case comes really within what was said by Parker J. in *Leschallas* v. *Woolf* (3): "Possibly, where the surrender is a surrender by operation of law upon the taking of a new lease, it may, under certain circumstances, be inferred that what is surrendered and re-demised is not the premises in their actual condition, but the premises minus the tenant's fixtures." There was here really no new tenancy; the terms of the existing tenancy were varied only without the creation of a new tenancy. It was not a case of surrender of an old lease and grant of a new one. It was a case of holding over upon the terms of a lease not yet granted and afterwards altered in two respects. The application of the doctrine to every case might have serious consequences—e.g., in mining leases, valuable trade machinery might be deemed to have passed to the landlord by virtue of surrender.

Where there is an equitable agreement for a lease which is afterwards executed the effect of that lease is merely to turn a tenancy in equity into a tenancy at law, by clothing the tenant with the legal estate. There was no surrender at all in 1911. The structures are not within the covenant to repair and deliver up in repair of 1911, and still less within that of 1868, which is in terms limited to landlord's fixtures. There is nothing amounting to an assignment by the tenant to the landlord of the things in question. [They also referred to *Ex parte Baroness Willoughby D'Eresby* (4); *Lambourn* v. *McLellan* (5); *Heap* v. *Barton*. (6)]

Luxmoore K.C., *Foà* and *Vaisey* for the respondent. 1. Whether these things are chattels or fixtures they are within the covenant contained in the lease of 1912. 2. If not, they are neither chattels nor trade fixtures. 3. If they are trade fixtures then on the principle of *Leschallas* v. *Woolf* (3)

(1) (1862) 2 J. & H. 520.
(2) [1901] 2 Ch. 388, 395.
(3) [1908] 1 Ch. 641, 654.
(4) (1881) 44 L. T. 781.
(5) [1903] 2 Ch. 268.
(6) (1852) 12 C. B. 274.

they become the property of the landlord, as to the tanks, in 1868, and as to the other things either when the agreement of 1910, or that of 1912, was entered into.

Upon the question of the construction of those documents it is necessary to refer to the lease of 1857. At that date none of these structures were upon the property. It was practically a lease of bare land. The company was established in 1868 to carry on the business of a manure manufactory. The question is, what is the meaning of "buildings and erections" in the covenant? Is it confined to permanent buildings? The word "erections" is not confined to structures which are attached to the soil. The lease of 1868 was a demise of the manufactory, and all the erections were included in the lease of 1912 and bound by the covenant to repair and leave in repair.

"Erections and buildings" here may include things which are chattels. *Naylor* v. *Collinge* (1); *Bidder* v. *Trinidad Petroleum Co.* (2); and *Earl of Mansfield* v. *Blackburne* (3) is practically this case. Here there is a demise of the manure works with the essential apparatus for the manufacture. What was to revert to the landlord on the termination of the lease was the manufactory as demised together with the buildings and erections which had been added during the term. All these things were essential parts of the works. It is said that the kilns pass but not the acid chambers and tanks, but it is submitted that they are part of the manufactory.

Lambourn v. *McLellan* (4) was relied on by the appellants, but that does not touch the question of the construction of this lease. The decision itself is not disputed, but it was not the case of the demise of a manufactory. It was a question as to the right to machinery and turned upon the meaning of what was to be delivered up in addition to the demised premises.

Thresher v. *East London Water Works Co.* (5) is not unlike the present case. All kinds of things have been held to be

(1) 1 Taunt. 19.
(2) (1868) 17 W. R. 153.
(3) (1840) 6 Bing. N. C. 426.
(4) [1903] 2 Ch. 268.
(5) (1824) 2 B. & C. 608.

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"buildings" within restrictive covenants in leases: *Wood* v. *Cooper*. (1) Here we have the additional word "erections," which is very wide.

If we are right upon the construction of the lease the other point does not arise. It is submitted, however, that these structures are not chattels. Assuming that they were not attached in any way to the walls that is not the sole test. The nature of the structure, the object for which and the circumstances under which it was erected must all be considered. Generally speaking, this feature is found running through the cases that the articles were definitely chattels. Here there is no definite chattel brought upon the premises, but only certain materials such as lead and wood.

It is said that it makes a difference whether the question in dispute is one between landlord and tenant, tenant for life and remainderman, or mortgagor and mortgagee. But see *Leigh* v. *Taylor*. (2)

The question of removability is a different thing. Annexation is always a question of fact.

Turner v. *Cameron* (3) is relied upon as giving a definition of "fixture." It is also defined by Blackburn J. in *Holland* v. *Hodgson*. (4)

It is impossible to say that attachment is the only test. *D'Eyncourt* v. *Gregory* (5) is the first case in which where there was no attachment yet the thing was held to be a fixture. It was part of the architectural design, and was held to be attached though not actually so.

Hobson v. *Gorringe* (6) was a case between mortgagor and mortgagee. The degree and object of the annexation are the considerations to be taken into account in determining the intention.

Monti v. *Barnes* (7) also shows that attachment or non-attachment is not conclusive.

In *Reynolds* v. *Ashby & Son* (8) Lord Lindley sums it up thus: "My Lords, I do not profess to be able to reconcile all the

(1) [1894] 3 Ch. 671.
(2) [1902] A. C. 157, 159.
(3) L. R. 5 Q. B. 306, 311.
(4) L. R. 7 C. P. 328, 335.
(5) L. R. 3 Eq. 382, 387, 396.
(6) [1897] 1 Ch. 182.
(7) [1901] 1 K. B. 205.
(8) [1904] A. C. 466, 473.

cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute."

The same thing was said in *Leigh* v. *Taylor* (1) by Lord Halsbury and Lord Macnaghten. Although there may be no physical annexation you can get it by intention. A structure which cannot be removed without destroying it is not a chattel.

Hellawell v. *Eastwood* (2) is not dissented from in principle. The real test is, can the thing be removed without its identity being destroyed? *Holland* v. *Hodgson* (3); *Whitehead* v. *Bennett*. (4)

From the nature of these structures they could only be removed by reducing them to lead and wood. They were not put up for a temporary purpose, but in order that they might be permanently enjoyed during the term. Assuming that they were chattels they could not be removed because they were necessary parts of the whole manufacturing plant; they were accessories. It is submitted, however, that they were neither chattels nor trade fixtures. If they are held to be trade fixtures then *Leschallas* v. *Woolf* (5) is in point. *Fitzherbert* v. *Shaw* (6) shows that they are only removable during the term. A new agreement puts an end to the right of removal unless it is expressly reserved: *Weeton* v. *Woodcock*. (7) On the execution of the new agreement the right of removal was gone. There were differences between the leases of 1857 and 1868. The parcels were changed, more land was included, and the rent increased. That point is covered by *Leschallas* v. *Woolf* (5), which was followed by Scrutton J. in *Slough Picture Hall Co.* v. *Wade*. (8)

On the true construction of the leases there was a voluntary

(1) [1902] A. C. 157, 161, 162.
(2) (1851) 6 Ex. 295.
(3) L. R. 7 C. P. 328, 336.
(4) 27 L. J. (Ch.) 474, 476.
(5) [1908] 1 Ch. 641.
(6) (1789) 1 H. Bl. 258.
(7) (1840) 7 M. & W. 14.
(8) 32 Times L. R. 542.

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renunciation by the company of these things, whether they were chattels or trade fixtures, and a redemise of them, first in 1868, and secondly in 1912. They were "buildings and erections," and under s. 6 of the Conveyancing Act, 1881, they passed as appertaining to the land demised.

Gover K.C. in reply.

Cur. adv. vult.

Feb. 20. LORD STERNDALE M.R. read the following judgment:—This appeal from Sargant J. raises a question of the rights of the parties under a lease of March 16, 1912, granted by the plaintiff to the defendants. [His Lordship read the material provisions of the lease and continued:] In February, 1916, a fire took place by which a great part of the works which were being carried on by the defendants as a manure manufactory were destroyed. The parts wholly or partially destroyed, included four acid chambers used for making sulphuric acid for the purpose of manure manufacture, two towers adjoining the chambers and connected by pipes with them and with the pyrites kilns to be mentioned afterwards, and a lean-to shed at the back of one of the acid chambers. One of the four acid chambers, called No. 3, had been cut down so as to leave nothing of the chamber remaining except the tank at the bottom, but, in my opinion, that alteration made no difference, and that chamber must be dealt with as if the alteration had not taken place. It was admitted that the lean-to shed must abide the result of the decision as to No. 4 chamber.

The first lease to the company was in 1857, and at that time none of the things now in question were in existence. The first three chambers, including that reduced to a tank, were constructed between that date and 1868 when a second lease was granted, and the fourth chamber and the lean-to shed between 1868 and 1912, when a third lease was granted. I shall refer later to the terms of the leases and the circumstances in which they came into existence. The lessor claimed damages under the covenants of the lease for breaches of the covenant to repair and leave in repair and also of the

covenant to insure and use the insurance money in reinstating the property, and in case of its being insufficient to make up the deficiency. It is immaterial under which covenant the claim is made.

The defendants deny their liability in respect of three items—(1.) the acid chambers, (2.) the lean-to shed, (3.) the towers—on the grounds, first, that they are chattels, and therefore do not come within the terms of the covenants, and, secondly, that even if not chattels, they are tenant's fixtures removable by the tenants and so not included in the covenants. The plaintiff denies that any of these items was a chattel, and contends that they were all buildings or erections, and therefore within the express words of the covenants. He also contends that if fixtures, they were not tenant's fixtures, and that even if they had at any time the character of tenant's fixtures, they had at the time of the fire lost that character by reason of certain surrenders and grants which took place in the years 1868 and 1912.

In order to ascertain whether these items or any of them were chattels, it is necessary to examine the nature of their construction. The evidence was not quite clear in some details, but substantially there was not much difference between the parties on the matter. There was some slight difference between the chambers in point of construction, but for the purposes of this case those differences were, in my opinion, immaterial.

To take chambers 1, 2, and 3 first, the description given below applies to all of them, there being only this difference, that in Nos. 1 and 2 the beams ran longitudinally in respect of the substructure hereinafter mentioned, with the joists running across them, while in No. 3 the beams ran transversely and the joists longitudinally. In each case the space below the chamber was surrounded by walls built with footings in the ordinary way. The outside walls had doors and windows and the space inside was used as a storehouse. The beams rested on these walls at the ends, and were supported by brick piers and also by iron columns which stood on prepared foundations, but were not in any way fastened

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to the foundations. Where the beams rested on the walls, they were sometimes laid upon the wall itself, on which a thin layer of mortar had been spread, and sometimes upon pieces of timber called wall plates, which were also laid in mortar. In some instances the beams were described by the manager of the defendant's works as going through the walls. By this I do not think that he meant that they were entirely surrounded by masonry, but that they were so surrounded on their sides but not at the top, the wall either being cut down in places to receive them, or built up on each side of them when in situ. Where the beams were supported by columns they were fastened by either nails or screws to caps on the top of the columns. These caps were of two kinds, some channelled to receive the beam and some flat, and in each case the cap was made with a stud which fitted into the hollow column in order to steady it, but was not fastened to the column in any other way. There was some question as to whether the columns and the walls and piers were all erected at the same time, but I think there was eventually no dispute that substantially they were all erected at the same time, though some columns might have been added at a later date. The joists were not mortised into the beams, but were cut so as to fit over them and remain firmly in the position in which they were placed. On the joists a floor was laid which made a roof for the space underneath, and above that on sill-pieces fastened to the floor there was a wooden superstructure not inaptly described as like a large crate the top of which was formed of joists. At the bottom of this crate there was a shallow leaden tank, and from the joists a leaden chamber open at the bottom was hung by leaden straps fastened to the upper joists. This leaden chamber did not come quite down to the bottom of the tank, but was suspended a little above it for purposes of the manufacture which it is not necessary to detail. As I have said, the superstructure of No. 3 had been cut down leaving only the tank remaining. No. 4 chamber differed in this respect, that it had not a wall surrounding it, but only a wall at one end upon which the ends of the beams rested. There were no brick piers, and the beams were supported along

their length and at the other end by columns standing by their own weight like those in Nos. 1, 2 and 3, and with similar caps attached to the beams. The beam at one side of this chamber rested on the projecting ends of the beams of No. 3. At one end of this group of four chambers there were two towers, called, we were told, Glover and Gay-Lussac towers respectively, consisting of a rectangular wooden framework with a leaden chamber within it. It is not necessary to describe the construction of the towers except so far as it relates to the uprights of the wooden framework. In order to support these, concrete or masonry foundations were made with a hole or recess in the middle. Iron shoes made with a stud to fit into these holes or recesses stood on the top of these foundations, and the timber uprights fitted into these shoes. The shoes were not in any way fastened to the foundations, and the uprights were not fastened to the shoes. On the other side of the towers there were pyrites burners. These towers were connected with the pyrites burners and the chambers by pipes. There was no evidence specifically directed to these pipes, but as it was admitted that gases from the burners passed from the burners to the Glover tower, from there through the chambers to the Gay-Lussac tower, and from there through the Glover tower back to the burners, it is obvious that there must have been such pipes. The description of the process given in Newth's Inorganic Chemistry (1916), at p. 431, was admitted to be a sufficiently accurate description of the process. It is as follows: "The gases from the double row of pyrites burners .... are led through the Glover tower .... where they effect the denitrification of the nitro-sulphonic acid..... From this tower they are delivered into the series of chambers, where they meet with the necessary supply of steam. The acid collects upon the floor of the chambers, and samples are constantly drawn off by means of an arrangement known as a drip-pipe, which, acting in a manner similar to a rain gauge, indicates the progress of the process going on within. The gases, after being drawn through the entire series of chambers by means of the draught caused by the tall chimney,

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are finally passed up the Gay-Lussac tower, ... where all the nitrogen peroxide is absorbed, and returned to the chambers through the intervention of the Glover tower . . . . as above described." The pipes were probably bolted together at the flanges in the ordinary way, but their exact construction is immaterial.

On these facts it was contended that the superstructures of the chambers, that is, the beams and everything above them, were chattels not attached to the substructure, and could be removed as chattels by taking the beams from the walls, piers and columns, bringing with them, of course, the detachable caps of the columns.

Many cases were cited to us, and it is not from any disrespect to the authorities, or to the arguments of counsel, that I refrain from examining them in detail, but because I agree with the statement in Foà on Landlord and Tenant, 5th ed., at p. 680: that "inasmuch as the whole question is in each case one of fact depending on its own circumstances, the decision in one case can seldom be a guide to a solution in another."

I think they decide generally that attachment or non-attachment to the freehold or to something which is attached to it, is a most important matter to be considered but not absolutely conclusive, but where the articles claimed to be chattels are not so attached, the onus lies heavily on those who deny them to be chattels.

The first point, therefore, for decision is whether these chambers were chattels. It was contended that though they were of great size (140 feet long, 20 feet wide and 13 or 14 feet high) and of great weight (about 20 tons when empty), they each constituted an independent structure which was completely severable from the walls and underlying structure, and apart from the difficulty arising from their great size and weights, could be lifted up from the sub-structure, leaving it intact, and undisturbed. I do not think this contention is sound. As a great deal of argument was addressed to us on the subject of the mortar, I think it better not to pass it without observation. I do not think it is of any

importance. I think the object was probably to make an even bed for the beam or wall plates, although some slight adhesion might take place. The beams seem to me to have been placed as they are in ordinary building, except that the walls were not carried above their level, and therefore there was no necessity for brickwork above them, and they were kept in their place by the weight of the superstructure. If, however, these chambers had been removed the result would have been to unroof the substructure which was used as a storehouse and to leave the walls where the beams had gone, as the manager called it, through them in a condition described by one of the learned counsel as crenelated. This may be seen in the wall on the left of the photograph B5. The beams which would come away were at different levels, and would carry away with them the movable caps of the columns. The chambers seem to me to bear no analogy to self-contained structures such as small windmills: *Rex* v. *Otley* (1); *Rex* v. *Londonthorpe* (2); barns: *Elwes* v. *Maw* (3); or granaries: *Wiltshear* v. *Cottrell* (4); which can be lifted up and taken away without disturbing in any way the supports on which they rest. I wish to adopt the language of Sargant J. on this point: "If you look at the size and permanence and the general character of the structure and the absence of any definite line of demarcation or division, the absence of any unity in the upper structure as distinguished from the lower structure, I think one is driven to the conclusion that the whole structure forms one single unit and is of the nature of a building, that it is not a chattel, that it is a fixture, and that the lower portion of this unit being embedded in the land by ordinary foundations, it cannot be considered a tenant's fixture, and must be considered from the beginning as being something permanently annexed to the freehold of the nature of a building." The towers present more difficulty. From their construction, which I have already described, there would be some reasonable ground, if they stood alone and unconnected with anything else, for contending that they

(1) 1 B. & Ad. 161.
(2) 6 T. R. 377.
(3) 3 East, 38.
(4) 1 E. & B. 674.

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were chattels, but they were not isolated or unconnected. They were connected by pipes, as I have described, with the burners and chambers, and were a necessary and integral part of a sulphuric acid plant, and in my opinion they must be considered as a part of the whole structure, in the same way that movable parts of an engine are considered as an integral part of the engine: *Mather* v. *Fraser* (1); or detached millstones as an integral part of a mill: *Place* v. *Fagg* (2); *Martyr* v. *Bradley*. (3)

The lean-to shed, it is admitted, follows the decision as to No. 4 chamber, and that chamber, I think, cannot be distinguished in principle from the others. It rests more upon columns and less upon walls, but it does rest at one end on a wall, and at one side it rests on the beams of No. 3, which themselves rest on the walls of the substructure. For these reasons I come to the conclusion on the facts that the whole of the things claimed to be chattels are buildings or parts of buildings, and are therefore directly within the covenants of the lease. I do not think it necessary to consider what would be the proper conclusion if the chambers were supported entirely on pillars resting by their own weight, as may be the case in the sketch on p. 431 of Newth's Inorganic Chemistry. I think, therefore, the appeal should be dismissed.

Sargant J. decided the case in favour of the plaintiff on another point, which arises in this way. In 1868 the defendants were tenants of the greater part of the land used by them as a manure manufactory under the lease I have mentioned of 1857, and also a small part under a yearly tenancy. In that year a new lease was taken of the whole of the land occupied by the defendants for the same period of lives at a rent which represented the combined rents of the two tenancies previously existing. In fact the only difference between the two tenancies was that the defendants obtained a lease for the small piece of land which they had previously held under a yearly tenancy. This lease of 1868

(1) 2 K. & J. 536. (2) (1829) 4 Man. & Ry. 277.
(3) (1832) 9 Bing. 24.

recited the surrender of the lease of 1857, but no deed of surrender seems to have been executed, and the surrender probably occurred by operation of law when the new lease was accepted. The parcels were differently described in the two leases, and a good deal of argument was addressed to us on that point and on other points in connection with the lease, which become immaterial in the view I have expressed as to the facts.

In 1910 the lease of 1868 came to an end by the dropping of the last life, that of his Majesty King Edward VII., but the defendants still continued in occupation of the land. In 1911 an agreement was made between the plaintiff and defendants for a new lease on certain terms different from those of the old lease. This agreement seems to me to have been a valid one and enforceable against either party. It was not, however, performed according to its terms, but a new lease on terms somewhat different from those of the agreement was granted in 1912. There was no reservation by the defendants on any of these changes of tenancy of their rights to tenant's fixtures, if any. Sargant J. held that in 1912 there was a surrender of the tenancy created under the enforceable agreement of 1911, and that by reason of the surrenders of 1868 and 1912, the defendants had lost their right to remove the things in question, even if they were tenant's fixtures and had taken a grant of them from the landlords, thus bringing them within the covenants as to buildings and erections contained in the lease of 1912.

In the view which I take of the facts, it is not necessary to consider this part of the case. I express no opinion upon it.

The appeal must be dismissed with costs.

WARRINGTON L.J. read the following judgment. [His Lordship, after stating the facts as above set out and observing that he did not attribute any importance to the fact that the wall plates of the structures were laid in mortar or that the beams in some cases rested on mortar, and that he thought on the whole the beams should be regarded as physically attached to the walls, and therefore to the land, but that the superstructure

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from the joists upwards rested on the beams by its own weight without physical attachment, continued]: The defendants seek to separate the several structures, Nos. 1, 2, 3 and 4, into their component parts. They admit that the walls and the brick piers are attached to the inheritance, and I hold that the wall plates and the beams supporting Nos. 1, 2 and 3 are also so attached. But they contend that so much of each structure as merely rests by its own weight on that which supports it, whether the latter be the soil itself or something attached to the soil, constitutes a chattel. In my opinion the several structures cannot be thus separated; I think the entire series of structures must, for the purposes of this case, be regarded as one composite building, composed of four parts, each of which is also a building, and if that composite building or any one of the minor buildings composing it (treating the building in each case as a single whole) is attached to the inheritance then the whole of such building is so attached. In the case of Nos. 1, 2 and 3, the walls enclosing what is substantially a ground floor are clearly attached to the inheritance, and so is the whole structure in my opinion. No. 4, though it has no enclosing walls, derives its support from No. 3, and cannot be regarded otherwise than as an extension of the previously existing building, and therefore (with the lean-to) attached to the inheritance.

If I am right in the view that no part of the structure in question can be separated from the rest and dealt with by itself none of the cases relied upon by the defendants will help them. The wooden barn on staddles in *Wansbrough* v. *Maton* (1), the granary in *Wiltshear* v. *Cottrell* (2), and the windmills in *Rex* v. *Londonthorpe* (3) and in *Rex* v. *Otley* (4) were all separate and independent buildings, and not part of a whole which was itself a building. A closer analogy is that of the horizontal slab of marble supported on stone supports fixed in the ground which, though itself unfixed, was treated as having lost its character of a chattel part of a

(1) 4 Ad. & E. 884.
(2) 1 E. & B. 674.
(3) 6 T. R. 377.
(4) 1 B. & Ad. 161.

garden-seat not attached to the soil by the supports: *D'Eyncourt* v. *Gregory*. (1)

So far I have said nothing about the towers. Each of these stands on four legs and each leg is dropped into an iron shoe standing on a stone foundation fixed in the ground, each shoe is kept in position by a projecting boss dropped into a hole in the stone foundation. The shoes are in no way affixed to the stone. Looked at by themselves apart from the chambers and from the purposes which they are intended to serve, these towers would, I think, be properly held to be chattels. Like the barn and the granary on staddles, the mill resting on the ground, and the other mill resting on but not attached to a brick foundation, they are in no way affixed, and would be capable of being moved without disturbing the soil. But I think they cannot properly be regarded by themselves. They are an essential part of the apparatus, the chambers constituting the bulk of it would be useless without the towers, and the towers would be useless without them. The chambers and the towers are and must be connected together, and if, as I think is the case, the chambers have been so constructed that they cannot be regarded as chattels the same result must, in my opinion, follow in respect of the towers which are an accessory to the rest of the apparatus: *Earl of Mansfield* v. *Blackburne*. (2)

The defendants, therefore, in my opinion, fail in their effort to establish that the structures in question or some parts of them are chattels. But they say if they are not chattels they are at all events tenants' fixtures which they had a right to remove. But, as I have said, I think they constitute a composite building not merely resting by its own weight on the soil or on a foundation but with its walls built into and thus forming part of the soil like the walls of any ordinary building. I can find no authority for holding that such a building can ever be regarded as a tenant's fixture; that is, something which, though attached to and passing with the inheritance, unless removed is removable by the tenant. There is one authority against such a view—namely, the

(1) L. R. 3 Eq. 382.

(2) 6 Bing. N. C. 426.

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judgment of Kindersley V.-C. in *Whitehead* v. *Bennett*. (1) He there decided that buildings though erected for the purposes of trade could not be removed as trade fixtures. I think this is an authority we ought to follow, and to hold that the several structures in question are not and never were trade fixtures removable by the tenants.

But assuming that I am wrong in this view, and that when first erected they were removable by the tenant, it remains to consider whether the subsequent dealings with the premises to which they are attached have not destroyed their quality of removability. I think it is clear that after a surrender of the term in the land to which tenant's fixtures are attached and a subsequent lease to the same tenant the latter can no longer remove the tenant's fixtures unless his existing right to remove them is reserved expressly or by necessary implication: *Leschallas* v. *Woolf*. (2) Chambers 1 and 2, the tank No. 3, and the towers were all in existence prior to the lease of 1868. This was expressed to be made "in consideration of the surrender" of a prior lease of the same land—namely, the lease of 1857. The lease itself, so far from reserving to the lessee any right to remove the erections in question, is expressed in terms which would include them in the demise, and the covenant to repair and to leave at the end of the term is wide enough to cover them.

In my opinion, it was impossible for the lessees, after the execution of that lease, successfully to insist on a right to remove any of the erections then in existence.

As to chamber No. 4 and the lean-to, the facts are different. They were erected after the lease of 1868. On the sudden determination by the death of the King of the term thereby created, the lessees had a right to remove their tenant's fixtures during a reasonable period after that event. They did not do so, but accepted a new lease granted in pursuance of a previous agreement in terms which are sufficiently wide to cover as part of the demised premises the chamber No. 4 and the lean-to shed. Sargant J. has held that the last-mentioned lease also was made upon a surrender of a former

(1) 27 L. J. (Ch.) 474. (2) [1908] 1 Ch. 641.

term, or involved the surrender of that term by operation of law, the term so surrendered being that created in equity by the agreement: *Walsh* v. *Lonsdale*. (1) I doubt, however, whether under such circumstances there is any surrender in point of law of the equitable term. I am inclined to treat the former lease as a confirmation rather than a destruction of the equitable term. The result, however, is, in my opinion, the same—namely, that the defendants having accepted a lease of the demised premises in terms which included the fixtures, and having made no stipulation reserving the right to remove them, they have lost any right so to do.

In my opinion, the appeal fails, and must be dismissed with costs.

YOUNGER L.J. read the following judgment:—I agree that this appeal should be dismissed, and I desire to adopt, if I may be permitted to do so, the reasons for that conclusion expressed by the Master of the Rolls in his judgment, reserving, as he has done, any expression of opinion upon what I may call the surrender point, one of great difficulty, as I think.

I confess that I have felt some hesitation in reaching the conclusion that the towers may properly be regarded, upon the true construction of this lease, as buildings.

I have, however, been convinced on this point by the consideration that upon the facts, these towers must be regarded as integral portions of buildings, more strictly so called, and properly comprehended, on this lease, in that description.

Appeal dismissed.

Solicitors for appellants: *Ravenscroft, Woodward & Co., for Eric R. Ward, Plymouth.*

Solicitors for respondent: *Walker, Martineau & Co.*

(1) (1882) 21 Ch. D. 9.

W. I. C.

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DAFEN TINPLATE COMPANY, LIMITED *v.* LLANELLY STEEL COMPANY (1907) LIMITED.

[1919. D. 363.]

Company—Articles—Alteration—Unrestricted Power to Expropriate any Shareholder—"Bona fide for the benefit of the Company as a whole"—Exception of one particular Shareholder from operation of Power—Fair Price of expropriated Shares fixed by Directors—Invalidity—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 13.

The defendant company, not having power under its original articles of association to acquire compulsorily the shares of members, passed special resolutions altering its articles and introducing a power enabling the majority of the shareholders to determine that the shares of any member (other than a certain named company) should be offered for sale by the directors to such person or persons (whether a member or members or not) as they should think fit at the fair value to be fixed from time to time at stated intervals by the directors.

The shareholders in the defendant company were principally companies and persons manufacturing tinplates who were originally invited to become shareholders on the understanding that, although under no legal obligation to do so, they were to take the steel bars required for their tinplates from the defendant company which was formed as a private company, with the object of providing such supply. The plaintiff company, which was an original shareholder of the defendant company, subsequently withdrew its custom and transferred it to a new rival steel company which the plaintiff company had been instrumental in forming. Being unable to acquire the plaintiff company's shares by agreement, the defendant company passed the resolutions in question with the object of acquiring the plaintiff company's shares and of protecting the defendant company against conduct on the part of its shareholders detrimental to the interests of the company:—

Held, that the resolutions in conferring an unrestricted and unlimited power on the majority of the shareholders to expropriate any shareholder they might think proper at their will and pleasure, went much further than was necessary for the protection of the company from the conduct of shareholders detrimental to the company's interests, and that the power thereby conferred could not be bona fide or genuinely for the benefit of the company as a whole and was not such a power as could be assumed by the majority.

Allen v. *Gold Reefs of West Africa* [1900] 1 Ch. 656; *Brown* v. *British Abrasive Wheel Co.* [1919] 1 Ch. 290, and *Sidebottom* v. *Kershaw, Leese & Co.* [1920] 1 Ch. 154 discussed.

Held also, that in the alteration of the original articles by the introduction of a power of expropriation the exception of one particular

member from the operation of the power, whereby a privilege was conferred upon the excepted member over other members of his class, was invalid.

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WITNESS ACTION.

The plaintiff company, which was a company limited by shares and incorporated under the Companies Acts, 1862 to 1893, was the holder of fully paid shares to the nominal value of 5000*l.* in the capital of the defendants, the Llanelly Steel Company (1907) Limited (hereinafter called "the Llanelly Company"), a private company incorporated in 1907 under the Companies Acts, 1862 to 1900, with a share capital of 250,000*l.* divided into 5000 shares of 50*l.* each. Each 50*l.* share was subsequently converted into 50 shares of 1*l.* each. This company was the successor of the Llanelly Steel Co., Ld., which was formed in 1896.

The following statement of the facts is taken from his Lordship's judgment: "The original company was a very successful undertaking and in 1907 it was determined to reconstruct the company and raise fresh capital for the purpose of enabling its operations to be extended. The company's business consisted of the manufacture of steel bars which were purchased by tinplate companies and firms which then rolled the bars into plates and covered the plates with tin, thus converting them into tinplates. It was thought desirable to offer the new capital to tinplate companies and persons having influential positions in the tinplate business in the Llanelly district with the object of securing a market for the increased output. At that time, as now, the principal shareholders were the Briton Ferry Steel Co., Ld., the Old Castle Iron and Tinplate Co., Ld., and the Western Tinplate Co., Ld. The Briton Ferry Steel Co. did not and does not make tinplates. It was and is a manufacturer of steel bars outside the Llanelly district, and neither was nor is a competitor of the Llanelly Company. Its managing director has throughout been the managing director of the Llanelly Company, and it has in this way very largely contributed to the success of the Llanelly Company. Various tinplate companies in the Llanelly district, including the plaintiff

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company and the defendants, the Old Lodge Tinplate Co., Ld., and at least one managing director or manager of a tinplate company in the district, were approached before the formation of the present Llanelly Company and agreed to take shares in the new company which on its incorporation proceeded to allot shares to these companies and persons. There was not any agreement by any of the shareholders to take a supply of steel bars from the new company; it was thought that the interest of the shareholders in increasing the profits of the company would be sufficient to ensure that they would take what steel bars they required from the company. This anticipation has in the main proved correct, as shareholders engaged in the tinplate industry have taken the greater part of their supplies of steel bars from the company. But in the year 1912 the plaintiff company and its managing director, Mr. John, formed another steel company called the Bynea Steel Works, Ld. This company has works within a few miles of the Llanelly Company. One of its principal shareholders is the plaintiff company, and Mr. John became chairman of the directors of the Bynea Company. The result has been that since 1913 the plaintiff company has taken the steel bars which it needed from the Bynea Company and has ceased to give any of its custom to the Llanelly Company. In these circumstances the directors of the Llanelly Company thought that it was not desirable that the plaintiff company should continue to be a member of the Llanelly Company. In 1913 Mr. John had a conversation with Mr. Williams, the chairman of the directors of the Llanelly Company, in the course of which Mr. Williams expressed the opinion that the plaintiff company ought not to continue to be a shareholder in the Llanelly Company, and this view appeared to Mr. John to be sensible. As a consequence of this conversation there were some spasmodic negotiations for the transfer of the plaintiff company's shares, but they proved unsuccessful.

"The articles of association of the Llanelly Company, which is a private company, contained restrictions on the transfer of shares under which, if the price was not agreed, it was to be determined by the auditors of the company. The plaintiff

company objected to having the value of its shares ascertained in this way, and no agreement as to price was reached. The plaintiff company was at first prepared to sell its shares for 10,000*l.*, but the price asked by the year 1919 had risen to 25,000*l.* In these circumstances in the year 1918 the directors of the Llanelly Company, who were honestly convinced that it was not to the interest of the company that the plaintiff company should remain a shareholder of the company and had realized that some of the other members of the company were taking some of their supplies from the Bynea Company, considered the question whether the articles of association of the Llanelly Company should be altered so as to render it possible for the shareholders to expropriate a shareholder who acted in a way similar to that which had commended itself to the plaintiff company. The directors' action was not in my opinion directed against the plaintiff company alone. They had, or thought they had, ground for apprehending that another steel company might gain control of the Old Castle Tinplate Company or the Western Tinplate Company, and divert its custom from the Llanelly Company. If this control were secured there would also be this additional peril. Under the articles of association of the Llanelly Company, the Old Castle Company, the Western Company and the Briton Ferry Company nominated two directors of the Llanelly Company each, and if a steel company obtained control of one of them it would in fact nominate two of the directors of the Llanelly Company, and thus have an opportunity of acquiring useful information respecting the business of the Llanelly Company, and thus obviously might cause very serious detriment to the Llanelly Company. In these circumstances the resolutions to which exception is taken in this action were submitted to the shareholders of the Llanelly Company.

"Before I deal with the resolutions in question I propose to refer to the articles of the Llanelly Company as they existed before these resolutions were passed. The company is a private company. Under the articles a shareholder who desires to sell his shares must give notice to the directors, who

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thereupon become his agents for the sale of the shares at a price to be agreed upon between him and the board, or in case of difference, to be determined by the auditor. The shares then have to be offered to the members of the company, and any which are not taken by members may then be sold by the shareholder to any person at a price not less than the price which has been fixed in the manner described. There are very special provisions in respect of the appointment of directors. The Old Castle Company, the Western Company and the Briton Ferry Company have the right to nominate two directors each. The six directors so appointed can appoint three more additional directors who are to be 'deemed' to represent all the shareholders other than the three companies which I have mentioned, and are called the shareholders' directors. The six directors and the shareholders' directors have power to appoint three more directors called supplemental directors. The three companies must always have six nominees on the board whose qualification in fact is the holding of the office of director of the nominating company, and as the appointment of the remaining directors is substantially in the hands of the six nominated directors, the three companies have in fact the control of the board of directors. In 1919 a number of proposed alterations of the articles were submitted to the shareholders. The material alterations relate to voluntary and compulsory transfers. [His Lordship read the proposed new articles which, so far as material, are set out below, and continued:] Those resolutions were passed as special resolutions. At the first general meeting which considered them it was explained that the provisions for compulsory transfer were intended to meet such cases as that of the plaintiff company's conduct in connection with the Bynea Company, and a possibility of a steel company obtaining control of the Old Castle Company or the Western Company. Two of the persons at the meeting at first doubted the propriety of the proposal but were converted. The representative of the Old Lodge Tinplate Company, which has been added as a defendant in this action, disapproved and voted against the proposal."

The proposed new articles were numbered 42A and 42B.

42A dealt with the case of members who were desirous of selling or transferring their shares and required them to offer such shares to the other members at a "fair value" which was defined as follows :—

"(c) The fair value aforesaid shall be ascertained as follows :—

"(1) The Board shall from time to time by resolution passed at a Board Meeting declare the fair value of the preference shares and the fair value of the ordinary shares comprised in any transfer notice. The notice convening any such Board Meeting shall state the intention to fix such fair value but it shall not be necessary to state in such notice the amount of such fair value."

. . . . . .

42B dealt with compulsory transfer of shares and was as follows :—

"*Compulsory Transfer.*"

"42B. The Company in General Meeting may determine that the shares of any member (other than the Briton Ferry Steel Co., Ld.) hereinafter called the outgoing member shall within fifty days after the passing of such resolution be offered for sale by the Board to such person or persons (whether a member or members or not) as the Board shall think fit at the fair value to be ascertained under sub-clause (*a*) hereof. On the passing of any such resolution the following provisions shall apply videlicet" :—

"(*a*) The fair value aforesaid shall be ascertained as follows :—

"(1) The Board shall from time to time by resolution passed at a Board Meeting declare the fair value of the preference shares and the fair value of the ordinary shares comprised in any resolution as aforesaid passed at a General Meeting of the Company. Such respective fair values shall be the same as those to be fixed in accordance with sub-clause (*c*) of Article 42A."

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"(2) Such resolution of the Board shall remain in force until the expiration of one year from the passing thereof or for such less period as shall be specified therein."

"(3) If at any time when a resolution as aforesaid is passed at a General Meeting of the Company any such resolution of the Board fixing the fair value is in force the fair value fixed by any such resolution of the Board for the preference shares shall be deemed to be the fair value of the preference shares comprised in the resolution as aforesaid passed at a General Meeting of the Company and the fair value fixed by any such resolution of the Board for the ordinary shares shall be deemed to be the fair value of the ordinary shares comprised in the resolution as aforesaid passed at a General Meeting of the Company."

"(4) Forthwith upon the passing of any resolution fixing the fair value the Board shall send to each member a copy thereof and the date thereof."

"(*b*) In case the Board shall effect any sale of any of the said shares comprised in any resolution as aforesaid passed at a General Meeting of the Company the fair value of any share so sold shall be paid to the Company and the Company shall pay such fair value to the outgoing member upon his handing to the Company the share certificates in respect of the shares sold and proper transfers of such shares. If the outgoing member neglects or refuses to receive such price or hand to the Company such share certificate and transfers for the period of twenty-one days from the time he receives a notice in writing from the Company that the Company is prepared to pay such fair value in exchange for such certificates and transfers such fair value shall be retained by the Company until such certificates and transfers shall be delivered to it and upon such delivery such fair value shall be paid to the outgoing member but the Company

may waive the delivery to it of such certificates and transfers but any such waiver shall be in writing."

" (*c*) Forthwith upon payment to the Company of the said fair value the names of the persons who shall purchase shares under this Article shall be entered in the register of members as the respective holders of the shares purchased by them as aforesaid in the place of the name of the outgoing members. The receipt of the Company for the said fair value shall be a good discharge to the persons who shall purchase shares under this Article and after the names of such persons shall have been so entered in the register the validity of the proceedings shall not be questioned by any person."

" (*d*) No sale under this Article shall be made of any shares to any member unless the Board shall first offer the shares at the fair value to the members (other than the outgoing member) as nearly as may be in proportion to the shares then held by them respectively and the offer shall in each case limit the time within which the same if not accepted will be deemed to be declared and may notify to the members (other than the outgoing member) that any member who desires any shares in excess of his proportion should in his reply state how many excess shares he desires to have and if any of the members (other than the outgoing member) do not claim their proportion the unclaimed shares shall so far as required be used for satisfying the claims in excess. In case the Board shall offer under this Article any shares to the members (other than the outgoing member) and in case any of such shares shall not be capable without fractions of being offered to all the members (other than the outgoing member) in proportion to the shares then held by them respectively the same shall be offered to such of the members (other than the outgoing member) and in such proportions or in such manner as may be determined by the Board."

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"(*e*) In case any shares offered for sale under this Article shall not be purchased within the said period of fifty days such circumstance shall not entitle the holder to transfer the same and such shares may at any subsequent time or times be again offered for sale under this Article in case a resolution as mentioned in this Article shall be passed at a subsequent General Meeting of the Company."

The original articles of association of the Llanelly Company contained no provisions whereby the shares of any member of the company could be compulsorily acquired.

On April 1, 1919, the plaintiff company (suing on behalf of itself and all other members of the Llanelly Company except those who were defendants) commenced this action against the Llanelly Company and its directors for a declaration that the resolutions were invalid and not binding on the plaintiff company so far as the same purported to alter the articles of association by the article numbered 42B, and for an injunction restraining the Llanelly Company, its servants and agents, from acting on such article.

The Old Lodge Tinplate Co., Ld., which was the holder of 20,000 ordinary shares of 1*l.* each and thirty-four preference shares of 50*l.* each in the Llanelly Company, desiring to intervene in the action on the ground that it was not properly represented by the plaintiff company, and that its interests were not identical with those of the plaintiff company, was by order added as a defendant in the action.

Cunliffe K.C., *Maugham K.C.*, and *Dighton Pollock* for the plaintiff company.

The plaintiffs' case is a strong one; this alteration is admittedly being made to expropriate the company and acquire its shares. The doctrine that purchases by persons having a confidential character cannot stand rests upon general principle, per Lord Eldon L.C.: *Ex parte James.* (1)

In *Allen* v. *Gold Reefs of West Africa* (2), Lindley M.R. said that the power conferred by s. 50 of the Companies Act,

(1) (1803) 8 Ves. 337, 345. (2) [1900] 1 Ch. 656, 671.

1862, to alter the articles must be exercised bona fide for the benefit of the company as a whole. The purchase proposed by the resolution is for the personal benefit of the directors and is not for the interests of the company as a whole. An alteration for the benefit of the majority and not for the benefit of the company as a whole is not good: *Brown* v. *British Abrasive Wheel Co.* (1) The question has been dealt with recently in *Sidebottom* v. *Kershaw, Leese & Co.* (2) and although, on the evidence, it was held that the resolution was passed bona fide for the benefit of the company as a whole, and that a resolution to expel a competing shareholder by buying him out was valid, yet the judgments in that case are very much in point. "The alteration must not be such as to sacrifice the interests of the minority to those of a majority without any reasonable prospect of advantage to the company as a whole": Buckley on the Companies Act, 9th ed., p. 25. *Atwool* v. *Merryweather* (3) and *Menier* v. *Hooper's Telegraph Works* (4) are both applicable and support the plaintiff's case. "Directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-west Transportation Co.* v. *Beatty* (5) and *Burland* v. *Earle* (6) have no application": per Lord Buckmaster L.C. in *Cook* v. *Deeks*. (7)

In the present case the defendants are seeking to buy out the plaintiff company at a price not settled bona fide by an independent board, and to put the plaintiffs' money into their own pockets for their own personal benefit and not in the interests of the company. The alterations are inherently objectionable because they are not in the interests of the company and involve a method of fixing an unfair price, and also because they are an oppressive attempt on the part of the defendants to get the shares at their own price.

(1) [1919] 1 Ch. 290.
(2) [1920] 1 Ch. 154.
(3) (1867) L. R. 5 Eq. 464*n*.
(4) (1874) L. R. 9 Ch. 350.
(5) (1887) 12 App. Cas. 589.
(6) [1902] A. C. 83.
(7) [1916] 1 A. C. 554, 564.

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Romer K.C., *P. F. Wheeler* and *G. Clark Williams* for the added defendant, the Old Lodge Tinplate Co. The wide form of this resolution places this defendant company in a difficulty, for if it is valid, although not primarily aimed at this company, there would be no redress if hereafter it was decided to expropriate this company. The Old Lodge Tinplate Company will be bound hand and foot if this resolution is passed, and there will be no corresponding obligation on the part of the Llanelly Company to supply this company with steel bars. It will not be able to bargain but will have to take the bars at the Llanelly Company's price, which is a position into which no shareholder should be put, and would be quite contrary to the terms upon which the Old Lodge Company entered the Llanelly Company, for it was then understood that the Old Lodge Company should be free to buy steel bars elsewhere.

These are not original articles but new articles introduced by special resolution, and if their introduction involves any oppression of the minority by the majority they cannot stand. In *Allen* v. *Gold Reefs of West Africa* (1), Lindley M.R. said that the power must be exercised "bona fide for the benefit of the company as a whole"; that means that the exercise must not only be for the benefit of the company in fact but also that the shareholders bona fide think that it is. What is not for the benefit of the company in fact does not become so because the shareholders may think that it is. It cannot be for the benefit of the company that a majority should be able to expropriate any shareholder without any reason. If these alterations are allowed to stand not a single shareholder will dare to raise a finger against the majority, and even an original article framed to forfeit the shares of any member commencing or threatening legal proceedings against the company or the directors on payment of the full value of the shares was held invalid: *Hope* v. *International Financial Society*. (2) Mere benefit of the company is not everything, the motive must be bona fide, and any element of unfairness in ascertaining the price is sufficient to vitiate the

(1) [1900] 1 Ch. 656, 671. (2) (1876) 4 Ch. D. 327.

resolution: *Sidebottom* v. *Kershaw, Leese & Co.* (1); *Allen* v. *Gold Reefs of West Africa* (2); *Brown* v. *British Abrasive Wheel Co.* (3); Buckley on the Companies Acts, 9th ed., p. 25. No witness has said that this alteration was for the benefit of the company as a whole; it is for the benefit of the majority, but that confuses the majority with the company.

Moreover, the resolution is further objectionable by reason of excluding the Briton Ferry Company from its operation. All shareholders of the same class stand on the same footing and any resolution altering their rights, unless binding on all the members of the class alike, is impeachable: per Romer L.J. in *Allen* v. *Gold Reefs of West Africa*. (4)

The method of ascertaining the price is also objectionable; it is an unfair method because the possible purchasers themselves fix the price. Any element of unfairness in fixing the price is sufficient to vitiate the resolution; that appears from the judgment of Lord Sterndale M.R. in *Sidebottom's Case*. (5)

Hughes K.C., Tomlin K.C., A. Sims and *Trubshaw* for the defendant company. Articles providing for the getting rid of competing shareholders and even for forfeiting their shares are quite usual: Palmer's Company Precedents, 11th ed., Part I., p. 970; and if inserted in the original articles are perfectly valid: *Borland's Trustee* v. *Steel Bros. & Co.* (6), the case of a compulsory transfer on bankruptcy; *Phillips* v. *Manufacturers' Securities* (7), approved in *Sidebottom's Case*. (1)

If not in the original articles they can be altered by inserting provisions to that effect under s. 13 of the Companies (Consolidation) Act, 1908; an alteration of the articles under that section is one of the incidents of the shares, and no complaint is open to a shareholder unless he can show that the alteration was not made bona fide in the interests of the company: *Allen* v. *Gold Reefs of West Africa* (2), that

(1) [1920] 1 Ch. 154.
(2) [1900] 1 Ch. 656, 671.
(3) [1919] 1 Ch. 290.
(4) [1900] 1 Ch. 656, 682.
(5) [1920] 1 Ch. 154, 159.
(6) [1901] 1 Ch. 279.
(7) (1917) 116 L. T. 290.

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reservation in favour of the shareholder being the exception to the rule that the Court will not interfere in the internal management of a company: *Burland* v. *Earle* (1); *Dominion Cotton Mills Co.* v. *Amyot* (2); *Foster* v. *Foster*. (3)

Allen v. *Gold Reefs of West Africa* (4) shows that the alteration can be made to affect the rights of a shareholder even if made to effect a particular object. In *Brown* v. *British Abrasive Wheel Co.* (5), the interests of the majority of 98 per cent. of the shareholders might well have been said to have represented the interests of the company, but the article in question was held to be invalid. That was a very special case and its authority is, we submit, questionable, having regard to the subsequent case of *Sidebottom's Case* (6) on which we rely.

The plaintiffs must establish mala fides. We do not allege that there was any legal obligation upon the tinplate manufacturers to take steel bars of the defendant company, but they were asked to become shareholders on the foundation of the defendant company and there was an honourable understanding to that effect which was carried out up to 1912, when the plaintiff company or its directors were instrumental in forming the Bynea Steel Works as a rival company to compete with and undersell the defendant company and supply the plaintiff and other companies. That was disloyalty and intolerable in a partnership, from which a private company differs little, and has led to the desire to terminate the plaintiffs' membership of the defendant company.

The plaintiffs to succeed must establish want of bona fides on the part of the defendant company: *Sidebottom's Case*. (6) The defendant directors bona fide believed that the alterations were for the benefit of the company, which is enough for s. 13. There is no proof of malice of any kind against them. In all the circumstances the resolutions adopt the most desirable method of fixing the price for the

(1) [1902] A. C. 83.
(2) [1912] A. C. 546.
(3) [1916] 1 Ch. 532.
(4) [1900] 1 Ch. 656.
(5) [1919] 1 Ch. 290.
(6) [1920] 1 Ch. 154.

shares, and are no more open to objection than the method in *Borland's Trustee* v. *Steel Bros. & Co.* (1)

Maugham K.C. in reply.

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Cur. adv. vult.

March 19. PETERSON J. stated the facts as above set out and continued: The question to be determined in this action is whether the resolutions which purport to confer the power of compulsory transfer are valid. The statement of claim alleged that the object of the resolution was to enable the members of the Llanelly Company, who have a controlling interest in the company, to compel the plaintiff company to sell its shares to the other members of the company, including the directors, against the wish of the plaintiff company, and at a price to be fixed by themselves, and thus to deprive the plaintiff company unfairly and oppressively of its property; and that it was the intention of the defendant company, as soon as the plaintiff company's shares had been purchased, compulsorily to declare a bonus on the shares in the Llanelly Company. The allegation as to the bonus which amounted to a charge of dishonesty was not opened by the plaintiff's counsel, nor did they in any way rely upon it. It was, I think, baseless. As to the allegations of the object of the resolution, no doubt it was contemplated that the plaintiff company's shares should be compulsorily acquired. But on the evidence that was not the sole object of the proposal. The real object was to protect the Llanelly Company against what was considered to be conduct on the part of any shareholder which was detrimental to the interests of the company. Having regard to the decision in *Sidebottom's Case* (2), it appears that a resolution altering the articles in such a way as to enable the shareholders to compel a shareholder who is actively interested in a competing firm to transfer his shares would be valid on the ground that it was an alteration which was bona fide for the benefit of the company. But in this case the resolution which was passed went much further than the protection of the company from

(1) [1901] 1 Ch. 279. (2) [1920] 1 Ch. 154.

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action by shareholders which could be properly considered to be detrimental to its interests. The resolution as passed enables the majority of the shareholders to compel any member (other than the Briton Ferry Company) to transfer his shares, although there may be no complaint of any kind against his conduct and it cannot be suggested that he has done, or contemplates doing, anything to the detriment of the company. It is an unrestricted power which authorizes the majority, if they think proper, or if they consider it in their own interests to require the transfer of his shares by any shareholder other than the Briton Ferry Company. It is true that the directors may offer the shares to any person, whether a member of the company or not; but having regard to the way in which the board is constituted, no one can doubt that if the majority desired to acquire the shares, the directors would offer the shares to the remaining shareholders under sub-clause (*d*). As drawn, the resolution authorizes the majority, at their will and without any reason, other than the desire to get into their hands the whole of the shares in the company, to expropriate the shares of the minority. I do not think that there is any intention at present of exercising the power in this way, or to this extent, but circumstances may arise in which the majority may think it to their interest to do so. The question is not whether it has been proved that it is intended to exercise the power to its full extent, but whether the articles as altered, which purport to confer this power on the majority, are valid. It is not, in my opinion, any answer to say that the question whether the power which has been taken is too extensive should be raised if and when it is exercised. If the majority has no right to alter the articles in this manner, the minority is entitled to challenge the alterations at once and to object to their incorporation in the articles.

I must therefore consider whether in this case it was within the power of the majority to alter the articles by a special resolution in such a way as to confer upon the majority authority to expropriate any shareholder or shareholders as they thought fit at their will and pleasure. For this purpose

I assume that any shareholder who was required to transfer his shares would receive in exchange the proper value of them. By s. 13 of the Companies (Consolidation) Act, 1908, which reproduces s. 50 of the Act of 1862, it is provided that subject to the provisions of the Act and to the conditions contained in the memorandum of association, a company may, by special resolution, alter or add to its articles, and any alteration or addition so made shall be as valid as if originally contained in the articles. The effect of this section was considered in *Allen* v. *Gold Reefs of West Africa.* (1) In that case a special resolution had been passed altering the articles of association so as to confer upon the company, which previously had a lien upon the partly paid shares of any shareholder who was indebted to the company, a similar lien on any shares whether partly paid or fully paid. This alteration was challenged by the legal personal representative of one Zuccani who was the only registered holder of fully paid shares and whose estate was indebted to the company. Lindley M.R., after observing that the language of s. 50 was very wide, stated that the power conferred by it "must like all other powers be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities"; and that "it must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded." In other words, the alteration of the articles must be effected in the manner prescribed by the statute; it must not exceed the limits of the power conferred by the statute, and it must be bona fide for the benefit of the company as a whole. In that case the Court of Appeal held that it was for the benefit of the company as a whole to alter its articles so as to obtain payment of debts due from shareholders to the company.

In *Brown* v. *British Abrasive Wheel Co.* (2), shareholders holding 98 per cent. of the capital of a company which was in need of further capital, were prepared to find the requisite capital if they acquired the remaining shares of the company,

(1) [1900] 1 Ch. 656, 671. (2) [1919] 1 Ch. 290.

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and after vainly endeavouring to purchase those shares by agreement, proposed to alter the articles so as to enable them to acquire the shares compulsorily. The learned judge, after stating that the question was whether this alteration was within the ordinary principles of justice, and whether it was for the benefit of the company as a whole, came to the conclusion that it was not in fact for the benefit of the company as a whole. This case was considered by the Court of Appeal in *Sidebottom's Case* (1) when the Court reaffirmed the test applied by Lindley M.R. in *Allen* v. *Gold Reefs of West Africa*. (2)

In *Sidebottom's Case* (1) the Court of Appeal sanctioned an alteration of the articles of association which enabled the directors to require a shareholder who carried on a competing business, or was a director of a company carrying on a competing business, to transfer his shares, and it did so on the ground that the alteration was for the benefit of the company as a whole. It has been suggested that the only question in such a case as this is whether the shareholders bona fide or honestly believed that the alteration was for the benefit of the company. But this is not, in my view, the true meaning of the words of Lindley M.R. or of the judgment in *Sidebottom's Case*. (1) The question is whether in fact the alteration is genuinely for the benefit of the company. Thus Lord Sterndale accepted and approved of the view expressed by Lord Wrenbury in his book on the Companies Act, 9th ed., p. 25, that: "Possibly the limitation on the power of altering the articles may turn out to be that the alteration must not be such as to sacrifice the interests of the minority to those of a majority without any reasonable prospect of advantage to the company as a whole," and stated that it agreed with the principle enunciated by Lindley M.R. Warrington L.J. protested against the idea that "bona fide" and "for the benefit of the company" were two separate things in Lindley M.R.'s exposition of the law; and Eve J. in stating the principle to be applied said: "Was the resolution adopted, or was the alteration made for the benefit

(1) [1920] 1 Ch. 154, 162, 173. (2) [1900] 1 Ch. 656.

of the company or for the benefit of some section of the company, without reference to the benefit of the company as a whole ? "

The question of fact then which I have to consider is whether the alteration of the articles which enables the majority of the shareholders to compel any shareholder to transfer his shares, can properly be said to be for the benefit of the company. It may be for the benefit of the majority of the shareholders to acquire the shares of the minority, but how can it be said to be for the benefit of the company that any shareholder, against whom no charge of acting to the detriment of the company can be urged, and who is in every respect a desirable member of the company, and for whose expropriation there is no reason except the will of the majority, should be forced to transfer his shares to the majority or to anyone else ? Such a provision might in some circumstances be very prejudicial to the company's interest. For instance, on an issue of new capital, the knowledge that he might be expropriated as soon as his capital was on the point of producing profitable results might well exercise a deterrent influence on a man who was invited to take shares in the company. Mr. Rees, one of the directors of the Llanelly Company, was asked by counsel for the Old Lodge Tinplate Company whether it would be in the interest of the company as a whole that the Western Tinplate Company and the Old Lodge Tinplate Company should be expropriated at the will of the majority, assuming they continued to take bars from the Llanelly Company, and did not set up steel works in competition with the Llanelly Company ; and he assented emphatically to the suggestion that it would not be for the benefit of the Llanelly Company as a whole. In my view it cannot be said that a power on the part of the majority to expropriate any shareholder they may think proper at their will and pleasure is for the benefit of the company as a whole. To say that such an unrestricted and unlimited power of expropriation is for the benefit of the company appears to me to be confusing the interests of the majority with the benefit of the company as a whole. In my opinion the power

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which, in this case, has been conferred upon the majority of the shareholders by the alteration of the articles of association in this case is too wide and is not such a power as can be assumed by the majority. The power of compulsory acquisition by the majority of shares which the owner does not desire to sell is not lightly to be assumed whenever it pleases the majority to do so. The shareholder is entitled to say non haec in foedera veni; and while on the authorities as they stand at present it is possible to alter the articles in such a way as to confer this power, if it can be shown that the power is for the benefit of the company as a whole, I am of opinion that such a power cannot be supported if it is not established that the power is bona fide or genuinely for the company's benefit.

Objection was also taken to the provision for compulsory transfer on the ground that the Briton Ferry Steel Company was specifically excluded from the operation of the new article. Why this company should be excluded in this way is not very apparent. Mr. Rees' view was that it was because this company was not a customer of the Llanelly Company, or a consumer of bars, and was not a competitor of the Llanelly Company; while Mr. Daniel Williams, the chairman of the directors of the Llanelly Company, thought that the Briton Ferry Company was exempt because it was not a consumer of bars and because it was desired to pay that company a compliment, as it had been largely concerned in the promotion of the Llanelly Company. But the Briton Ferry Company may be bought up by a steel company which competes with the Llanelly Company; it may start steel works within the Llanelly district and compete with the Llanelly Company, and it may gain control of the tinplate companies, members of the Llanelly Company, in which it is now a share holder, and remove the custom of those companies from the Llanelly Company. In such circumstances Mr. Rees was of opinion that the Briton Ferry Company should be subject to the same provisions as any other shareholders who behave in this way. If one of the shareholders can be excluded from the operation of the altered article in this way it is not apparent

why the Western Company and the Old Castle Company should not also be excluded. These two companies also took an active part in the formation of the Llanelly Company, and if they may possibly in the future act to the detriment of the Llanelly Company, so too may the Briton Ferry Company. The power which has been taken, however, is not restricted to cases in which a shareholder's conduct is prejudicial to the Llanelly Company. It is a power which enables the majority to expropriate any shareholders, other than the Briton Ferry Company, at their will and pleasure. The exclusion of a shareholder from the operation of such a clause places him in a position of privilege. If the articles are to be altered so as to confer a power of expropriation, the power ought in my view to apply to all the shares, unless perhaps it could be established that it is for the benefit of the company that certain shares should be exempt. Prima facie all the shares of the classes affected should be on the same footing; some should not be placed in a position of inferiority or superiority. The majority cannot alter the articles in such a way as to place one or more of the minority in a position of inferiority, as for instance, by attributing to his or their shares a smaller proportional share of the available profits than that which the others receive, nor can it in my view confer on one or more of its own number benefits or privileges in which other shareholders of the same class do not participate. It may be that the exclusion of some particular shareholder from the operation of an expropriation clause can in some cases be justified by showing that the exclusion is for the benefit of the company as a whole. On that point I do not express any opinion, but assuming this to be so, I am not able to find any adequate reason in this case for saying that the exemption of the Briton Ferry Company from the operation of the new article is or was for the benefit of the Llanelly Company.

Objection was also taken to the ascertainment of the fair value of the shares by the directors under the new article 42B. In the view which I have taken of this case it is unnecessary for me to deal with this contention, but, as at present advised, I should not be prepared to hold that in this case, in which

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the directors and shareholders of the Llanelly Company acted without any vindictive motive, the alteration of the article is open to objection on the ground that the ascertainment of the fair value is left to the directors.

In my opinion, for the reasons which I have given, the new article 42B is invalid.

Solicitors: *J. B. Somerville, for Brodie & Walton, Llanelly; Speechly, Mumford & Craig, for Roderick & Richards, Llanelly; Smith, Rundell & Dods, for F. N. Powell, Llanelly.*

R. M.

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SUN PERMANENT BENEFIT BUILDING SOCIETY *v.* WESTERN SUBURBAN AND HARROW ROAD PERMANENT BUILDING SOCIETY.

[1919. S. 1882.]

Building Society—Rules—Dissolution—Liquidators' Power of Sale—Supervision Order—Contract to sell Mortgages to another Building Society—Surplus Moneys available for Investment—Ultra Vires—Form of Mortgage—Concurrence of Mortgagor in Transfer—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16, 25, 32—*Building Societies Act*, 1894 (57 & 58 *Vict. c.* 47), *ss.* 8, 9, 10.

Where the members of an incorporated building society in pursuance of its rules duly pass a resolution to wind up the society voluntarily and appoint liquidators for that purpose, the resolution operates as a dissolution of the society under sub-s. 2 of s. 32 of the Building Societies Act, 1874, and the liquidators have power to sell and realize the assets of the society without first obtaining a supervision order under the Companies (Consolidation) Act, 1908.

The liquidators of the plaintiff society, which was in course of dissolution under sub-s. 2 of s. 32 of the Act of 1874, agreed to sell and transfer to the defendant society for 6400*l.* thirty-seven of the freehold and leasehold mortgages which the plaintiff society held as security for advances made to its members. The printed form of mortgage used by the plaintiff society provided (clause 11) that the expression "the society" should extend to and include the successors and assigns of the society where the contract should require or admit thereof. It being objected (inter alia) on behalf of the defendant society (*a*) that the agreement was ultra vires the defendant society, because at the date of the agreement

the surplus funds of the defendant society not immediately required for its purposes were insufficient to pay the purchase price in full, and (*b*) because the mortgages were not transferable without the concurrence of the various mortgagors:—

Held, that the plaintiff society and its liquidators were not bound to satisfy themselves before entering into the agreement that at its date the defendant society was possessed of funds not immediately required for its purposes sufficient to pay the purchase price, and that the mere fact that at that date it had not in hand sufficient surplus funds to pay the purchase price in full did not render the agreement ultra vires and void ab initio.

Chapleo v. *Brunswick Permanent Building Society* (1881) 6 Q. B. D. 696 distinguished.

Held, also, that having regard to clause 11 in the plaintiff society's form of mortgage, the mortgages were transferable without the concurrence of the various mortgagors, and therefore it was unnecessary to decide the larger question whether a building society mortgage without such a provision was transferable without the concurrence of the mortgagors.

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The plaintiff society was established in 1866, and was afterwards incorporated under the Building Societies Act, 1874, and its rules, as altered, were registered under the Act.

Rule 81 was as follows: "The Society is permanent, but it shall be dissolved if the dissolution thereof be resolved upon by the vote of three-fourths of the members present at a Special General Meeting of the Society convened for that purpose; and such meeting, by a resolution passed in like manner, may also appoint liquidators to conduct the winding up of the Society, and may fix their remuneration; and in default of such appointment, the Directors for the time being shall be ex-officio liquidators. The liquidators shall have power, if they think necessary, to apply to the Court of Chancery that such winding up may be continued under the supervision of that Court; and the winding up shall be conducted in conformity with the provisions of the Act 37 & 38 Vict. c. 42 relating to liquidation under the supervision of the Court."

At a special general meeting of the plaintiff society held on March 25, 1919, and duly convened for that purpose, a resolution was duly passed "that the Society be wound up voluntarily," and the plaintiffs Eaton and Ellis were

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appointed liquidators for the purposes of such winding up and their remuneration was fixed.

The defendant society was established in January, 1874, and later the same year was incorporated under the Building Societies Act, 1874. Its new rules were registered under the Act, and rule 15 provided :—

" The Board shall have power to employ any surplus funds in such manner authorized by 37 & 38 Vict. c. 42, s. 25, as they in their discretion may deem most beneficial to the Society."

On May 28, 1919, the liquidators of the plaintiff society entered into an agreement for the sale and transfer by the plaintiff society to the defendant society for the sum of 6400*l.* 11*d.* 1*d.* of thirty-seven of the freehold and leasehold mortgages held by the plaintiff society as security for advances made by it to its borrowing members.

At the date of this agreement the defendant society had a sum of 2500*l.* on deposit at its bankers, which sum the directors then considered was not immediately required for the purposes of the defendant society, and it also had at such date unexhausted borrowing powers to the extent of 3300*l.* or thereabouts, but at the same date its directors had received from its members notices of withdrawal of funds amounting to 2121*l.* 10*s.* 4*d.*

On the matter passing into the hands of the legal advisers of the defendant society objections were raised that the plaintiffs could not make a good title to the mortgages, and, after some correspondence, the plaintiffs issued a writ to obtain specific performance of the agreement. After delivery of pleadings the parties agreed to state a Special Case (embodying the above facts) for the opinion of the Court on three preliminary points of law raised on the pleadings, namely :—

1. Whether the agreement was ultra vires the defendant society ; and, if so, whether it was capable of being enforced by the plaintiffs against the defendant society.

2. Whether the liquidators of the plaintiff society and the said society had power under the provisions of the Building Societies Acts and of rule 81 of the plaintiff society's rules to

sell and transfer the said mortgages in pursuance of the said agreement without obtaining a supervision order under the Companies (Consolidation) Act, 1908.

3. Whether the plaintiff society and its liquidators could sell and transfer the said mortgages pursuant to the said agreement without the concurrence of the mortgagors.

The printed form of mortgage (also part of the Special Case) used by the plaintiff society in making advances to its members contained (clause 11) a declaration that "the expression 'mortgagor' hereinbefore used shall in all cases where such an interpretation is not inconsistent with the context be construed to include the heirs executors administrators and assigns of the mortgagor, and that the expression 'the Society' shall extend to and include the successors and assigns of the Society where the context shall require or admit thereof."

The Building Societies Act, 1874, enacts :—

Sect. 15 : "With respect to the borrowing of money by societies under this Act, the following provisions shall have effect :—

"(1.) Any society under this Act may receive deposits or loans, at interest, within the limits in this section provided, from the members or other persons, or from corporate bodies, joint stock companies, or from any terminating building society, to be applied to the purposes of the society :

(2.) In a permanent society the total amount so received on deposit or loan and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members."

Sect. 32 : "A society under this Act may terminate or be dissolved :—

"1. Upon the happening of any event declared by its rules to be the termination of the society.

"2. By dissolution in manner prescribed by its rules.

. . . . . .

"4. By winding up, either voluntarily under the supervision of the Court or by the Court, if the Court shall so order, on the petition of any member authorised by three-fourths

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of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the society, or on the petition of any judgment creditor for not less than fifty pounds, but not otherwise." . . . .

Sect. 33 provides that two or more societies may unite with others, or one society may transfer its engagements to another.

The Building Societies Act, 1894, enacts :—

Sect. 8 : "(1.) Notwithstanding anything in the Building Societies Acts, every society under those Acts shall be deemed to be a company within the meaning of the Companies (Winding-up) Act, 1890."

Sect. 9 : "Where a society under the Building Societies Acts is being dissolved in manner prescribed by its rules or in pursuance of the consent of three-fourths of the members, the provisions of the Building Societies Acts shall continue to apply in the case of the society as if the liquidators or other persons conducting the dissolution of the society or the trustees appointed under the instrument of dissolution were the board of directors or committee of management of the society."

Sect. 17 : "The powers of investment under section twenty-five of the Building Societies Act, 1874, shall include power to invest in or upon any security in which trustees are for the time being authorised by law to invest."

Jenkins K.C. and *E. A. Wurtzburg* for the plaintiffs. On the first point the plaintiffs have nothing to do with the question whether the defendants have or have not surplus funds available to carry out the contract. That is a domestic matter which concerns the defendants but does not affect the plaintiffs. Under s. 25 of the Act of 1874, as enlarged by s. 17 of the Act of 1894, and rule 15 of the defendants, they have power to invest in real or leasehold securities, and this contract is sufficiently within their power of investment. The same considerations do not apply as in the case of a borrowing power where there is a statutory limit. Secondly, the modes of dissolution of a building society are alternative. They can proceed under their rules or they can be wound

up by the Court. Here, the plaintiff society are proceeding under rule 81, which operates as a dissolution under sub-s. 2 of s. 32 of the Act of 1894, and under the resolution the liquidators have, it is submitted, an implied power to sell and realize the assets. Thirdly, a mortgage is prima facie assignable, and the rule it is submitted applies to a building society mortgage. The fact that a mortgagor member of the society has advantages and privileges under the rules does not make the mortgage unassignable. The general question whether a building society mortgage is transferable without the concurrence of the mortgagor does not really arise here, because by clause 11 of the form of mortgage the expression "the society" is to include "assigns." The general question was decided in the Irish case of *Ulster Permanent Building Society* v. *Glenton* (1), but there the mortgagor was an attesting witness. The point was discussed but left open in *In re Rumney and Smith.* (2) There is nothing in the Building Societies Act, 1874, which precludes a society from agreeing with its mortgagor member that the mortgage shall be transferable. [They also referred to the Building Societies Act, 1836; various rules of the plaintiff and defendant societies; Wurtzburg on Building Societies, 4th ed., p. 448; Key & Elphinstone's Conveyancing Precedents, 10th ed., vol. ii., p. 137; Davidson's Conveyancing, 4th ed., vol. ii., Part II., p. 704n; *Old Battersea Building Society* v. *Inland Revenue Commissioners.* (3)]

Owen Thompson K.C. and *E. A. Jennings* for the defendants. We contend that the contract was ultra vires the defendants and void ab initio, because at the date of the contract they had not surplus funds not immediately required available for investment. The date of the contract is the material date, and if they had no power to contract at that date, the contract is ultra vires and unenforceable: Fry on Specific Performance, 5th ed., p. 247. The defendants could not exceed their borrowing powers to assist them to complete the contract, and the plaintiffs in dealing with the defendants were bound

(1) (1888) 21 L. R. Ir. 124. (2) [1897] 2 Ch. 351.
(3) [1898] 2 Q. B. 294.

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to ascertain for themselves whether the defendants were acting within their powers: *Chapleo* v. *Brunswick Permanent Building Society.* (1) Moreover, a building society mortgage is not a real or leasehold security within the meaning of s. 15 of the Act of 1874 as extended by s. 17 of the Act of 1894. It is not a trust security. Secondly, the resolution of March 25 is not a mere dissolution under the rules but is in substance a voluntary winding up within sub-s. 4 of s. 32, and the liquidators have no power of sale but must first obtain a supervision order under the Companies (Consolidation) Act, 1908: Buckley on Companies, 9th ed., pp. 312–13; *In re Sunderland Building Society* (2); Building Societies Act, 1894, ss. 8, 9, 10. Thirdly, a building society mortgage is not transferable without the concurrence of the mortgagor. In Wurtzburg on Building Societies, 5th ed., p. 286, it is pointed out that *Ulster Permanent Building Society* v. *Glenton* (3) is of doubtful validity, and in *In re Rumney and Smith* (4) the Court of Appeal doubted the right to transfer but left the point open. The essence of our objection is that the Building Societies Acts do not contemplate such a transfer. The mortgage is a contractual relationship under the rules between the society and its member which gives him certain rights and privileges, and entitles him to say "you cannot transfer without my consent." There is no obligation on a transferee to observe the rules. Clause 11 in the form of mortgage does not assist to make the mortgage assignable. [They also referred to the rules of the plaintiff society; Key and Elphinstone's Conveyancing Precedents, 10th ed., vol. ii., pp. 137, 140, 263; and s. 33 of the Building Societies Act, 1874.]

Jenkins K.C. in reply on the question of ultra vires. We admit that the date of the contract is the material date to determine the validity of the contract. If at that date the contract was within the apparent powers of the defendant society that is sufficient. The plaintiffs were not bound to ascertain whether the defendants were acting within the scope

(1) 6 Q. B. D. 696.
(2) (1888) 21 Q. B. D. 149.
(3) 21 L. R. Ir. 124.
(4) [1897] 2 Ch. 351, 358, 360.

of their powers: *Eastern Counties Ry. Co.* v. *Hawkes* (1); *In re David Payne & Co.* (2)

Owen Thompson K.C. on cases last cited.

Cur. adv. vult.

April 19. P. O. LAWRENCE J. This action is brought to enforce an agreement for the purchase by the defendant society of certain mortgage securities belonging to the plaintiff society. The defendant society is resisting the action, and has raised three preliminary points, the determination of any one of which in its favour is fatal to the success of the action. In these circumstances the parties have by consent stated a Special Case for the opinion of the Court under Order XXXIV. of the Rules of the Supreme Court.

The first point taken by the defendant society is that the agreement was ultra vires the defendant society because at the date of the agreement the defendant society was not possessed of sufficient funds not immediately required for its purposes to meet the purchase-money payable under the agreement. At the hearing it was admitted that the date of the agreement —namely, May 28, 1919—is the crucial date for determining whether or not it was ultra vires. The purchase-money amounted in round figures to the sum of 6400*l.* On May 28, 1919, the defendant society had 2500*l.* on deposit at its bankers, it also had unexhausted borrowing powers to the extent of about 3300*l.*, and it had received from its members notices of withdrawal of funds amounting to about 2121*l.* There is no statement or admission as to any other funds belonging to the defendant society, and I think that I am justified in drawing the inference that the defendant society had not at the date of the agreement funds not immediately required for its purposes sufficient to pay the agreed purchase-money of 6400*l.* In these circumstances the defendant society contends that the agreement was ultra vires the defendant society on the ground that under s. 25 of the Building Societies Act, 1874, the defendant society had no power to contract to pay a price for the purchase of investments

(1) (1855) 5 H. L. C. 331, 345, 370. (2) [1904] 2 Ch. 608.

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exceeding its funds not then immediately required for its purposes. Sect. 25 enacts that a society under the Act may, from time to time, as the rules permit, invest any portion of the funds of the society not immediately required for its purposes upon (inter alia) real or leasehold securities. Rule 15 of the rules of the defendant society provides that the board of directors shall have power to employ any surplus funds in such manner authorized by s. 25 of the Building Societies Act, 1874, as they in their discretion may deem most beneficial to the society. It cannot be disputed that the mortgage securities comprised in the agreement are real or leasehold securities, or therefore that they are authorized investments under s. 25 of the Act of 1874. I have been informed by counsel and have no reason to doubt that the point now raised is a novel one. The point is of importance, because if it is sound every person who agrees to sell any investment to a building society will have not only to satisfy himself that the investment is one which falls within the class of authorized investments (which is a perfectly reasonable requirement) but will also have to satisfy himself that at the date of the contract for sale of the investment the society is possessed of funds not immediately required for its purposes sufficient to pay for the investment which it contracts to purchase. This would seriously hamper building societies in making investments, as it would cast a burden upon the sellers of investments which in most cases they would be advised not to undertake, and in those cases in which a willing seller could be found would compel the society to disclose its entire financial position to the seller. Moreover, it would prevent building societies from entering into contracts for the purchase of investments in anticipation of the receipt of funds which they knew were about to come in. It is contended on behalf of the defendant society that the principle established by the case of *Chapleo* v. *Brunswick Permanent Building Society* (1) (which decides that where a society borrows money in excess of its borrowing powers such borrowing is ultra vires) is applicable to the present case. In my opinion

(1) 6 Q. B. D. 696.

the principle laid down by that case rests upon an intelligible basis, and is one which gives rise to little if any practical difficulty. Any person lending money to a statutory body must satisfy himself as to the power of that body to borrow money, and if the power happens to be limited in amount must satisfy himself that the loan which he is about to make does not exceed that limit. Although this rule imposes upon the lender the obligation, in cases where the borrowing power is limited, of ascertaining whether the borrowing power has already been exercised to any and what extent, yet such an investigation is in my opinion quite different from the investigation which an intending seller would have to make before agreeing to sell an investment to a building society if the contention put forward by the defendant society in the present case is right. In my judgment the sole object of s. 25 is to limit the range of investments which the society is authorized to purchase, and the section does not purport nor is it intended to place any further or other limit upon the power of building societies to make investments. In my opinion the expression "funds not immediately required for its purposes" contained in this section is employed for the purpose of describing the moneys which would naturally be utilized by the society for making investments, and is used in the same sense as the expressions "moneys not immediately required," "moneys requiring investment," and "moneys not immediately payable" are frequently used in powers of investment contained in memoranda of association of limited companies, in settlements, and in wills. If this is the right view I am further of opinion that the power of investment conferred by this section implies a general power to contract for the purchase of any investment coming within the range of investments authorized by that section, and I think that such a contract would be intra vires the society both in cases in which the society, at the date of entering into it, had not sufficient surplus funds to pay for the investment, and in cases in which the society at the date of entering into it had sufficient surplus funds to pay for the investment but before completion some event had happened (e.g., notices of with-

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drawal had been given by members) which had caused the surplus funds to be immediately required for the purposes of the society and therefore to be no longer available for the completion of the purchase of the investment. I am not now considering the question whether the Court would exercise its extraordinary jurisdiction in granting specific performance of a contract by a building society to purchase an investment if it were shown at the trial that no surplus funds were available to complete the contract, whether such want of available funds had arisen by reason of there never having been any or by reason of such available funds having been diminished or exhausted after the date of the contract. It may well be that the Court in such circumstances would decline to make a decree for specific performance. Nor am I considering whether the Court would in such circumstances grant anything more than nominal damages for a breach of the agreement. Those are matters which will no doubt require careful consideration when the case comes on for trial, and I express no opinion upon them. The sole point I am now considering is whether the mere fact that at the date of the contract to purchase authorized investments the society had not in hand sufficient surplus funds to pay for the investments in full renders the contract ultra vires and void ab initio. It may be that the directors in the present case were wrong in entering into the agreement, and that they did so in wilful disregard of their duties, or carelessly, or through an error of judgment—all these are purely domestic matters which may or may not have to be gone into at the hearing—but, in my judgment, do not render the contract ultra vires. I am inclined to agree with the plaintiff's contention that the principle laid down in such cases as *Eastern Counties Ry. Co.* v. *Hawkes* (1) and in *In re David Payne & Co.* (2) bears a closer analogy to the principle which ought to be applied to the present case than the principle laid down in *Chapleo's Case.* (3) In *Hawkes' Case* (1) the House of Lords held that, where a railway company had power to purchase

(1) 5 H. L. C. 331. (2) [1904] 2 Ch. 608.
(3) 6 Q. B. D. 696.

land required for extraordinary purposes only, a vendor was entitled to enforce a contract for sale of land notwithstanding that it was proved that the land was not required for such purposes, a fact of which he had no notice at the date of the agreement. In *In re David Payne & Co.* (1) it was held by Buckley J. and the Court of Appeal that where a company had power to borrow money for its purposes the lender was not bound to inquire into the purposes for which the money was required, and that the misapplication of the moneys did not render the loan void in the absence of notice that it was borrowed for an unauthorized purpose. It is true that these cases differ from the present case, in that the real purpose for which the land was purchased in the one case and the loan was obtained in the other was the crucial fact upon which the company in each case relied to avoid the contract, whereas in the present case the fact upon which the defendant society relies is that it had not at the date of the agreement sufficient surplus moneys to enable it to carry out the purchase—yet I think that from one point of view it may well be said that s. 25 of the Act of 1874 amounts in substance to a power to purchase certain specified classes of property for a particular purpose—namely, for the purpose of rendering profitable the funds of the society not immediately required for its purposes, and that if that be the true view then the principles established by *Hawkes' Case* (2) should be applied, and in the absence of any notice that the investments were not really required for such a purpose (which of course would be the case if there were no or not sufficient surplus funds), the agreement ought to be held valid. Although I consider that the question is not free from doubt I have for the reasons stated come to the conclusion that the agreement in the present case was not ultra vires. I purposely abstain from answering the second part of the first question in the Special Case, as I consider that the question as to the manner in which and the extent to which (if at all) the Court will enforce the agreement is one to be decided at the trial after all the facts have been ascertained.

(1) [1904] 2 Ch. 608. (2) 5 H. L. C. 331.

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The second question raised in the Special Case is one which relates to the power of the plaintiffs to sell the mortgage securities. It is said on behalf of the defendant society that the liquidators of the plaintiff society have no power to sell its assets unless a supervision order under the Companies (Consolidation) Act, 1908, is first obtained. In my judgment there is nothing in this contention. Under sub-heading 2 of s. 32 of the Building Societies Act, 1874, a society may be dissolved in manner prescribed by its rules. Rule 81 of the rules of the plaintiff society provides that the society shall be dissolved if the dissolution thereof be resolved upon by the votes of three-fourths of the members present at a special general meeting of the society convened for that purpose, and such meeting by a resolution passed in like manner may also appoint liquidators to conduct the winding up. On March 25, 1919, at a special general meeting of the plaintiff society duly convened for that purpose a resolution was duly passed by the votes of three-fourths of the members present that the plaintiff society should be wound up voluntarily, and the plaintiffs Eaton and Ellis should be appointed liquidators for the purposes of such winding up. In my judgment this resolution operated as a dissolution of the plaintiff society in the manner prescribed by its rules within the meaning of sub-heading 2 of s. 32 of the Act of 1874, and was not (as was contended on behalf of the defendant society) an attempt to wind up the plaintiff society under sub-heading 4 of s. 32, which in order to become effectual requires an order of the Court. Sect. 9 of the Building Societies Act, 1894, provides that when a society is being dissolved in manner prescribed by its rules the provisions of the Building Societies Acts shall continue to apply in the case of the society as if the liquidators conducting the dissolution were the board of directors of the society. The effect of this section in my opinion is to enable the liquidators in the present case to sell and transfer the mortgage securities comprised in the agreement if such securities are in fact transferable by the plaintiff society.

The third and last question is whether the mortgage securities

comprised in the agreement are transferable by the plaintiff society without the concurrence of the various mortgagors. In my judgment this question is determined by the language of the mortgage securities themselves. All the mortgage securities comprised in the agreement are mortgages granted to the plaintiff society in respect of advances made by it to its members. A print of the form of mortgage used by the society in the case of freeholds forms part of the Special Case, and all the mortgages of freeholds comprised in the agreement are assumed to be in that form. By clause 11 of the form of mortgage it is declared that the expression "the Society" shall extend to and include the successors and assigns of the society where the context shall require or admit thereof. Now it cannot be said (and indeed it has not been seriously argued) that the context does not admit of the expression "the Society" extending to and including its successors and assigns in the habendum, in the proviso for redemption, in the covenant for payment of the moneys secured, in the power of entry into possession and receipt of the rents and profits of the mortgaged premises, and in the attornment clause. Mr. Owen Thompson and Mr. Jennings have been driven to contend that I ought to ignore clause 11 altogether, or at all events that I ought to confine the words "successors and assigns" to a society taking a transfer of the engagements of the plaintiff society under s. 33 of the Building Societies Act, 1874. In my judgment I am not at liberty to do the one or the other. I have been referred to a precedent of a building society's mortgage contained in Key & Elphinstone's Precedents in Conveyancing, 10th ed., vol. ii., p. 137. This precedent contains a provision regulating the right of the parties after the mortgage has been transferred by the building society. It is argued that looking at this precedent the parties in the present case could not have intended that the mortgages comprised in the agreement should be transferable, as otherwise they would have inserted a similar provision to that contained in the precedent. I draw no such inference. In my opinion the only legitimate inference to be drawn from the precedent is that the draftsman of the mortgages

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in question in the present case has not been as careful as, regard being had to the precedent, it appears that he might have been, in defining the position of the parties after a transfer. In my judgment the effect of clause 11 is equivalent to a provision that the mortgage should be transferable by the plaintiff society without attempting to make any provision as to the position of the mortgagor and transferee after the transfer. It is possible that difficulties as to the rights of the parties after the transfer may occur in certain events but none that have been suggested appear to me insuperable. Taking the view I do of the true construction of the mortgages in the present case it is unnecessary for me to express any opinion upon the larger question whether a building society mortgage in the absence of an express provision in that behalf in the mortgage deed is or is not transferable. In the Irish case of *Ulster Permanent Building Society* v. *Glenton* (1) it was held by Monroe J. that a building society mortgage is transferable by assignment to a third person. From the judgments delivered in the case of *In re Rumney and Smith* (2), however, it appears that none of the learned judges who decided that case were prepared without further argument to accept the Irish decision as laying down the law correctly. The point has been fully argued in the present case but I prefer not to express my opinion upon it, as such an expression of opinion would, in the circumstances, be a mere obiter dictum.

In the result I hold that the defendant society has failed to establish any of the three preliminary points it has taken, and the action must proceed to trial.

Solicitors for the plaintiffs : *Naunton & Son.*
Solicitor for the defendants : *Graham Gordon.*

(1) 21 L. R. Ir. 124.

(2) [1897] 2 Ch. 351.

H. L. F.

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[1919. D. 752.]

C. A. 1919 EVE J. Dec. 18, 19, 20 C. A. 1920 April 30; May 3, 4.

Restraint of Trade—Solicitor and Managing Clerk—Contract of Service—Restrictive Covenant—Limited in Space, unlimited in Time—Reasonableness—Interests of Parties and of Public—Injunction.

The duration of a restrictive covenant, extending during the whole life of the covenantor, in an agreement of service relating to a profession, is not, in itself, sufficient to make the restriction unreasonably wide.

By an agreement dated August 17, 1912, made between the plaintiff, who was a solicitor practising at Tamworth, and the defendant, who had entered into his service as a junior clerk in 1899, and subsequently became his managing clerk, the defendant agreed to serve the plaintiff in that capacity for three years, and expressly agreed with the plaintiff that he would not, on the expiration or sooner determination of that term, either alone, or jointly with any other person or persons, directly or indirectly, "be engaged or manage, or concerned in the office, profession, or business of a solicitor, within a radius of seven miles of the Town Hall of Tamworth," except in respect to a particular business therein mentioned. On June 30, 1914, the plaintiff terminated his agreement with the defendant. In June, 1919, the defendant intentionally committed a breach of the agreement in order to test the validity of the restriction:—

Held, by Eve J., that the restrictive covenant was reasonable in the interests of the contracting parties, and also in the interests of the public, and that the plaintiff was entitled to an injunction to enforce it.

Held, by the Court of Appeal (affirming the decision of Eve J.), that the covenant was not rendered unreasonable by the fact that the restraint was imposed for the whole life of the covenantor.

Hitchcock v. *Coker* (1837) 6 Ad. & E. 438 followed.

Morris v. *Saxelby* [1916] 1 A. C. 688, 707 discussed.

WITNESS ACTION.

The plaintiff, John Hunt Dewes, for twenty-two years past had been a solicitor in considerable practice at Tamworth in the county of Stafford, where he held several public appointments. The defendant, Thomas Birch Fitch, entered his employment as a lad in the year 1899, and having served him for four years as junior clerk was in 1903 given his articles. He was then about 18 or 19 years of age, and in 1908, when the articles were about to expire and he was on the point of going up for his

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final examination, an agreement was entered into between him and the plaintiff, whereby if he passed the examination (as he in fact did, and was admitted a solicitor in February, 1909) he was to be employed as the plaintiff's managing clerk for a term of three years certain from June 30, 1908. The employment under this agreement was continued down to December 31, 1911, and from that date down to June 30, 1914, when the parties finally separated, their mutual rights were governed by an agreement of August 17, 1912, varied only by an agreement of February 5, 1914.

By the agreement of August 17, 1912, the defendant agreed to serve the plaintiff as managing clerk during the term of three years from December 31, 1911, upon certain terms as to his share of profits in addition to his salary, and by clause 7 of this agreement it was provided as follows: "The said Thomas Birch Fitch hereby expressly agrees with the said John Hunt Dewes that he will not, on the expiration or sooner determination of the said term of three years, or any extended term as herein provided, either alone, or jointly with any other person or persons, directly or indirectly, be engaged or manage or concerned in the office, profession, or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth, but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners' Association at Tamworth, or within the aforesaid radius thereof." The exception added to the end of the clause related to a personal appointment which the defendant held as solicitor for the North Warwickshire Miners' Association. The population of the two main towns and the scattered villages within the restrictive area aggregated some 21,000 persons.

By the agreement of February 5, 1914, it was provided that certain modifications should be made in the agreement of August 17, 1912, and that the defendant should have the right to open an office at Nuneaton (some thirteen miles distant from Tamworth), and should be entitled to receive the full profits of such business for his own use, as well as the profits of the legal business in connection with the North Warwickshire

Miners' Association. It was also agreed that the defendant should give three days a week at least to the service of the plaintiff at his Tamworth office, and that the plaintiff should have the option of dispensing with the services of the defendant on June 30, 1914, instead of December 31, 1914.

The articles of clerkship contained covenants operating to restrict the defendant's professional activities after the determination of his employment by the plaintiff, but the duration of the restriction was less prolonged in the articles of clerkship than in the agreements of 1908 and 1912: in each of the latter it was in the same terms as above set out, and on each occasion the clause was drafted by the defendant and accepted by the plaintiff without any alteration. Down to the month of February, 1914, the defendant was required to devote his whole time to the plaintiff's business, and he was paid a salary of 2*l.* a week and in addition one-half of the net profits ascertained in each year after payment to the plaintiff out of the gross profits of a sum of 300*l.*, but after January, 1914, the defendant's profits were reduced from one-half to one-fourth.

During the years when the defendant was acting as managing clerk to the plaintiff he came into personal contact with the clients of the plaintiff, and, subject to his supervision, had the conduct of the business, and during the absence of the plaintiff in connection with his official employments, had the sole charge and control of the office. The plaintiff and defendant finally separated on June 30, 1914.

On June 24, 1919, the defendant deliberately broke the restrictive covenant in the agreement of August 17, 1912, by appearing as solicitor before the Wilnecote county magistrates at the Town Hall, Tamworth, on behalf of two former clients of the plaintiff so as to test the validity of the restriction.

The plaintiff thereupon brought this action, and claimed an injunction to restrain the defendant from acting in breach of the restrictive covenant, on the ground that it was reasonably necessary to protect the plaintiff's connection, and to prevent

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the divulgence or the use and employment of the secrets of the plaintiff's practice.

The action came on for hearing before Eve J. on December 18, 1919.

Maugham K.C. and *Henry Johnston* for the plaintiff. According to the universal usage amongst solicitors the defendant was precluded at the termination of his agreement with the plaintiff from practising as a solicitor within a certain radius of the town where he was employed. The only question is were the terms of the restricted covenant reasonably necessary for the plaintiff's protection ?

One of the older cases where the covenant was unlimited as to time is *Hitchcock* v. *Coker* (1), where Tindal C.J. laid down the principle to be applied in these cases. That was followed in *Ward* v. *Byrne* (2), where the covenant was unlimited in point of space.

In *Avery* v. *Langford* (3) there is a list of reported cases from 1711 to 1853 containing restrictive covenants held to be good. Pollock on Contracts, 8th ed., pp. 379–381, continues the list. The general principle which they establish is that restrictions of this kind are good if not more than are reasonably necessary for the purpose of the covenantee, and also in no way injurious to the public : *Nordenfelt* v. *Maxim Nordenfelt Co.* (4), where Lord Macnaghten expressed the true view and recognized *Hitchcock* v. *Coker* (1) as good law.

Other cases turning upon the reasonableness of restrictions of this character are *Mason* v. *Provident Clothing and Supply Co.* (5) ; *Attorney-General of Australia* v. *Adelaide Steamship Co.* (6) ; *North Western Salt Co.* v. *Electrolytic Alkali Co.* (7) The defendant may seek to rely on *Morris* v. *Saxelby* (8) and some of the passages in Lord Parker and Lord Shaw's judgments. But the same test was applied there as in the older cases, and the principle has not been affected. On the whole,

(1) 6 Ad. & E. 438.
(2) (1839) 5 M. & W. 548.
(3) (1854) Kay, 663, 667.
(4) [1894] A. C. 535, 565, 571.
(5) [1913] A. C. 724.
(6) [1913] A. C. 781, 794.
(7) [1914] A. C. 461.
(8) [1916] 1 A. C. 688.

this is a covenant usual between solicitors and articled or managing clerks and for the benefit of both parties. The precedents of these covenants between solicitors and clerks and medical practioner and assistant, etc., are to be found in Key & Elphinstone's Precedents, 10th ed., vol. i., pp. 35, 36; Prideaux's Precedents, 21st ed., vol. ii., p. 1264; Encyclopædia of Forms and Precedents, vol. ii., p. 78, cl. 5; vol. xiii., pp. 74, cl. 10, 102, cl. 7; Moore's Practical Forms of Agreements, 6th ed., p. 270.

Clayton K.C. and *J. E. Harman* for the defendant. The question here raised is vital to the profession, and the defendant seeks a decision upon the principle involved. We submit that a covenant in an agreement of this nature must not restrain competition per se, and the fact that this covenant is unlimited as to time is a fatal objection to it: *Edmundson* v. *Render* (1); *Woodbridge* v. *Bellamy* (2); *Dayer-Smith* v. *Hadsley*. (3) It might have been a reasonable restriction if it had been limited to the time when the plaintiff was practising as a solicitor himself, or his assignees, but this restriction is to last for the life of the defendant and is too wide.

The principle laid down by Tindal C.J. in *Hitchcock* v. *Coker* (4) and *Horner* v. *Graves* (5) is not disputed, but the application of it is different now. There is no fixed standard of public policy. The law does not alter, but public policy does, and tends now in favour of the servant and not of the employer. We submit that there must be a fixed limit of time, as appears in almost all of the precedents referred to. On the whole, this restrictive covenant is unreasonable as regards the defendant and as regards the public: *Konski* v. *Peet* (6); *Sir W. C. Leng & Co.* v. *Andrews* (7); *Eastes* v. *Russ* (8); and *McEllistrim* v. *Ballymacelligott Agricultural Society*. (9)

Morris v. *Saxelby* (10) covers the present case as the effect of the covenant is to deprive the public of the skill and mental

(1) [1905] 2 Ch. 320.
(2) [1911] 1 Ch. 326.
(3) (1913) 108 L. T. 897.
(4) 6 Ad. & E. 438.
(5) (1831) 7 Bing. 735.
(6) [1915] 1 Ch. 530.
(7) [1909] 1 Ch. 763.
(8) [1914] 1 Ch. 468.
(9) [1919] A. C. 548.
(10) [1916] 1 A. C. 688.

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qualifications which the defendant has acquired, as was pointed out by Lord Parker in that case.

[They also referred to *Nicholls* v. *Stretton* (1), the case of an articled clerk, where the covenant was unlimited as to time and was held not to operate unduly in restriction of trade.]

Maugham K.C. in reply. There can be nothing oppressive in this covenant which was drawn by the defendant himself without any pressure on the part of the plaintiff and was accepted by him.

EVE J. This action has been brought at the instigation of the defendant with the object of having it determined whether a restrictive covenant entered into by him is binding upon and enforceable against him, or whether it is void as being in the nature of an excessive restraint on trade. [His Lordship stated the preliminary facts and continued :] The defendant admits that the plaintiff has throughout behaved with generosity and kindness towards him, that he has instructed him in his profession in an efficient and satisfactory manner, and that he has reposed in him the fullest confidence and given him full and free access to the clients of the business. I say the defendant admits it because the plaintiff gave evidence on all these points and the defendant by his counsel stated that he accepted what the plaintiff had said and did not wish to go into the box to controvert the plaintiff's evidence. The summary prepared from the call books kept by the firm and produced by the plaintiff shows that the attendances on clients and other persons coming to the office in connection with the business of clients were in recent years about equally divided between the plaintiff and the defendant, and the plaintiff is no doubt justified in saying, as he did, that he could not have done more for the defendant or treated him differently if he had been his partner. When, as frequently was the case, more particularly since early in 1912, the plaintiff was away attending to the duties of his public appointments the defendant was in sole control of the office and business.

Such being the relations of the parties down to June 30,

(1) (1847) 10 Q. B. 346.

1914, when the restrictive covenant with which this action is concerned came into operation, I now turn to consider its terms. [His Lordship read the restrictive covenant from the deed of August 17, 1912.]

The first thing to do is to construe the restriction. I do not think this presents much difficulty. It is a restriction which, in effect, restrains the defendant for the rest of his life from practising as a solicitor either as a principal or agent within the area included in a radius of seven miles from the Town Hall of Tamworth. The draftsmanship may be open to a suggestion of verbosity, but the meaning and effect of the clause are in my opinion tolerably plain. The question then arises, is this restriction reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public ?

I am extremely anxious not to make any unnecessary contribution to the literature for which this question, framed in words taken from one of Lord Parker's speeches, is already responsible, and in answering it I will as far as possible confine myself to language culled from the literature I have just referred to, but in order to show that the language is appropriate I ought perhaps to state a few further facts.

The area of restriction includes Tamworth, a borough of some 7000 inhabitants, Lichfield, a city of about 6000 souls, and several scattered villages, occupied for the most part by a mining population, aggregating about another 7000 persons. The plaintiff's practice extends over the whole area, in that clients come to him from most of the villages, from Lichfield, and of course from Tamworth itself. It includes a substantial advocacy practice, and this was largely conducted by the defendant. The plaintiff deposed to what is perhaps in the nature of common knowledge, that in small communities such as Tamworth, where most of the inhabitants are fairly well known to one another, an intimate knowledge of their neighbours' affairs is either possessed or its acquisition eagerly desired by a majority of the residents. It is therefore a community in which the seal of professional confidence has to be most zealously guarded and wherein any indiscreet

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disclosure on the part of an adviser might be attended with disastrous consequences. Of and over clients drawn from such a community, and of their affairs, the defendant, by reason of his employment by the plaintiff, has obtained such personal knowledge and influence as will enable him, if he is allowed to compete, to take advantage of the plaintiff and to utilize the information he has obtained while confidentially employed by the plaintiff. When therefore he left the employ of the plaintiff he left it equipped with two types of property, the one professional secrets, names of clients, and all such things as in sound philosophical language, to use Lord Shaw's words, are denominated "objective knowledge." "These," adds Lord Shaw: see *Morris* v. *Saxelby* (1), "may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained." The other type of property with which he was equipped was the skill, dexterity, and mental ability which he had acquired and developed largely with the assistance of the plaintiff, but which, as Lord Shaw goes on to emphasize, are not his master's property, but are his own property. No public interest compels the rendering of these dormant, or sterile, or unavailing.

Such being the position I cannot bring myself to hold that the restraint affords more than adequate protection to the party in whose favour it is imposed, or that it was not in the interest of the covenantor to so restrict himself for the sake of the advantages he has obtained by so doing. He has been adequately and properly educated and trained in his profession; he has been introduced to a large body of clients and given every opportunity of learning their affairs, and of disclosing to them the skill and ability of which he is possessed. This equipment of these advantages he carries away with him, and the only restriction imposed upon him is that he shall not employ his objective knowledge within the restricted area. Outside that area he can act for clients, whether resident within the area or not, with whom and with whose business he has become acquainted solely by reason of his employment

(1) [1916] 1 A. C. 688, 714.

by the plaintiff; in other words, he is left free to use for his own purposes outside the restricted area the whole of his subjective knowledge, and so much of his objective knowledge as relates to the affairs of clients of his former employer who elect to employ him.

It is said that the restriction is not reasonable in the interests of the contracting parties, because it is imposed for the whole of the defendant's life, but when attempts were made by counsel appearing for him to suggest what would be a reasonable limit from their point of view their proposals did not agree, and in the end the objection on this ground resolved itself into this, that if the plaintiff's business were wholly discontinued, either in consequence of the defection of clients, or of the plaintiff relinquishing it or for some other cause, the restriction would become superfluous and of no use to anybody; and it was urged this possible result proves that the restraint is more than is requisite for the plaintiff's protection. I cannot agree with this. Agreements of this nature are entered into on the supposition that the owner of the business will not abandon it, and that if and when it exhibits symptoms of anæmia he will take steps to revive it by the infusion of new blood. I think the argument founded on the possible demise of the business is too far fetched, and in the absence of authority to support the suggestion that a duration extending during the whole life of the covenantor is sufficient in itself to make a restrictive agreement relating to a profession unreasonably wide, I am content to adopt the reasoning of Tindal C.J. in *Hitchcock* v. *Coker* (1), as affording sufficient reasons for coming to the opposite conclusion.

I come therefore to the conclusion that the contract is reasonable in the interests of the parties, and the only matter which remains is whether it is reasonable in the interests of the public. "To be reasonable in the interests of the public it must be in no way injurious to the public," says Lord Parker in *Morris* v. *Saxelby*. (2)

Now how does this restriction affect the public? It does not prevent a single individual from availing himself of the

(1) 6 Ad. & E. 438, 454. (2) [1916] 1 A. C. 688, 707.

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defendant's services. He may take all his business to the defendant so long as it is business that can be transacted outside the restricted area. It has not been disputed, subject to the question of its duration, that a restriction preventing the defendant from acting for any person who was a client of the plaintiff during his employment would be valid. But such a restriction would impose a far greater disability on the defendant towards the public in that it would prevent all those members of the public who had resorted to the plaintiff during the defendant's employment from availing themselves of the defendant's services under the existing restriction. As I have already pointed out, it is open to every member of the public to resort to the defendant for the transaction of any business, other than legal business which must be transacted within this limited and sparsely populated area, and I cannot think that a restraint which inconveniences the public to so insignificant an extent as that can seriously be said to be injurious to the public.

In my opinion the restraint is a valid and enforceable one. The plaintiff is entitled to the injunction he asks, and to the costs of the action.

G. M.

The defendant appealed. The appeal was heard on April 30, May 3, 4, 1920.

Clayton K.C. and *J. E. Harman* for the appellant. The restraint in clause 7 of the agreement of August 17, 1912, is bad on the following grounds: (1.) the agreement is a service agreement; (2.) the covenant is unlimited in point of time; (3.) a breach may be committed outside the area by doing an act within the area: *Edmundson* v. *Render* (1); *Woodbridge* v. *Bellamy* (2); (4.) the restraint was entered into by the appellant when he was bound by a succession of agreements, the first being made when he was an infant; and (5.) the restraint is aimed at competition per se.

It is the policy of the State and for the benefit of the

(1) [1905] 2 Ch. 320, 324. (2) [1911] 1 Ch. 326.

community that every person should be able to work when and where he likes, and therefore a restraint on his doing so is prima facie bad; but a reasonable restraint is permitted. The interests of the State and the interests of the servant are the dominating factors. Any restraint which aims at competition per se is invalid. Here the restraint is imposed during the whole life of the covenantor, whether the covenantee continues to carry on the business of solicitor or not, and is therefore unreasonable. If the restraint had been for five or ten years it would possibly have been reasonable. In the recent cases dealing with the freedom of the servant the Court has shown an increasing tendency to favour him: see the observations of Lord Haldane and Lord Shaw in *Mason* v. *Provident Clothing and Supply Co.* (1)

Eastes v. *Russ* (2) was a case of trade secrets. There the restriction in a contract of service was held on construction to last during the whole of the defendant's life, and was held by the majority of the Court of Appeal to be wider than was reasonably necessary for the plaintiff's protection, and therefore void. In *Morris* v. *Saxelby* (3) it was held that a covenant against competition per se would not be enforced. It is submitted that in the present case the lifelong restraint of the appellant is wholly unnecessary for the protection of the respondent, and is therefore bad: *Hitchcock* v. *Coker* (4); *Horner* v. *Graves.* (5) The principle laid down by those cases has not changed although its application has.

[They also referred to *Nicholls* v. *Stretton.* (6)]

Maugham K.C. and *Henry Johnston* for the respondent. The recent decisions of the House of Lords have not altered the law. They were attempts to restrain competition in cases where the employees had no knowledge of trade secrets which the employers were entitled to protect. The present case falls exactly within the class where Lord Parker held a restraint of competition was permissible.

(1) [1913] A. C. 724, 731, 732, 740.
(2) [1914] 1 Ch. 468.
(3) [1916] 1 A. C. 688.
(4) 6 Ad. & E. 438, 444.
(5) 7 Bing. 735.
(6) 10 Q. B. 346.

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[WARRINGTON L.J. Lord Parker in *Morris* v. *Saxelby* (1) includes in addition to knowledge of trade secrets the influence the employee has acquired over the customers.]

Yes. The law is that an employer may restrain competition if and so far as necessary to protect trade secrets and guard against the use by the servant of his personal knowledge and influence over customers. *Hitchcock* v. *Coker* (2), which is the foundation of Lord Macnaghten's judgment in the *Nordenfelt Case* (3), shows that a restraint is not void on the ground that it is as regards time unlimited. There is no case in which a partial restraint, otherwise reasonable, has been held unreasonable because of its being unlimited in point of time: per Rigby L.J. in *Haynes* v. *Doman.* (4) In *Eastes* v. *Russ* (5) the restraint as to space was unreasonably wide, and the decision therefore does not conflict with Rigby L.J.'s statement in *Haynes* v. *Doman.* (4) The limit as to time is not to be tested by exceptional cases: *Rannie* v. *Irvine* (6); *Haynes* v. *Doman.* (7) You must take probable and not extreme cases. All that the respondent is asking the Court to do is to protect his connection against the appellant's knowledge of his former employer's secrets and influence over his clients.

[WARRINGTON L.J. referred to *Howard* v. *Woodward.* (8)]

[They also referred to *Bunn* v. *Guy* (9); *Nicholls* v. *Stretton* (10); *Duignan* v. *Walker* (11); *May* v. *O'Neill* (12); Jolly on Contracts in Restraint of Trade, 3rd ed., p. 137.]

J. E. Harman in reply. The covenant in this case is either good as a whole or it is not. It cannot be severed: *Sir W. C. Leng & Co.* v. *Andrews.* (13)

[WARRINGTON L.J. *Eastes* v. *Russ* (5) turned on this, that the restriction there was not necessary to protect a connection.]

(1) [1916] 1 A. C. 688, 710.
(2) 6 Ad. & E. 438.
(3) [1894] A. C. 535.
(4) [1899] 2 Ch. 13, 28.
(5) [1914] 1 Ch. 468.
(6) (1844) 7 Man. & G. 969.
(7) [1899] 2 Ch. 13, 30.
(8) (1864) 34 L. J. (Ch.) 47.
(9) (1803) 4 East, 190.
(10) 10 Q. B. 346.
(11) (1859) 28 L. J. (Ch.) 867.
(12) (1875) 44 L. J. (Ch.) 660.
(13) [1909] 1 Ch. 763, 771.

No hard and fast rule can be laid down in these cases. In each case all the circumstances and the construction of the covenant must be considered. The question is, Is the restriction in the present case imposed to protect the respondent against competition? It is submitted it is, and that it is therefore void: *Hepworth Manufacturing Co.* v. *Ryott.* (1)

LORD STERNDALE, M.R. This appeal from Eve J. raises an important question between two gentlemen, both of them solicitors carrying on business, one at Tamworth and one partly at Tamworth and partly at Nuneaton, as to the meaning of a covenant restricting the defendant from carrying on business within a certain area under certain conditions. The matter begins with articles of clerkship which were entered into between the defendant and the plaintiff, by which the defendant became an articled clerk to the plaintiff. The plaintiff was then, and is now, carrying on business at Tamworth; and the defendant is therein described as the younger son of Thomas Birch Fitch, of Glascote, near Tamworth, Glascote being almost part of Tamworth. The articles were of the usual description, and contained the following covenant: "The said Thomas Birch Fitch the younger"—that is, the defendant—"shall not nor will at any time or times during such time as the said John Hunt Dewes shall continue or be in practice at Tamworth aforesaid as a solicitor settle or practise as a solicitor within the Borough of Tamworth aforesaid or within eight miles thereof." It is not a very wide restrictive covenant, because it is confined to the time during which the plaintiff continues to be in practice at Tamworth, and it only debarred the defendant from settling or practising as a solicitor within the Borough of Tamworth. Those articles, which were dated in 1903, would expire in 1908. In 1908 a new agreement was entered into by which the defendant undertook for three years, from June 30, 1908, to act as clerk to the plaintiff and not to divulge any secrets of the business; and finally agreed as follows: "The said Thomas Birch Fitch hereby expressly agrees with the said John Hunt Dewes that

(1) [1920] 1 Ch. 1.

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he will not on the expiration or sooner determination of the said term of three years or any extended term as herein provided either alone or jointly with any other person or persons directly or indirectly be engaged or manage or concerned in the office profession or business of a solicitor within a radius of seven miles from the Town Hall of Tamworth." That is a more extensive restriction. It is not limited in time, as the restriction in the articles was, to the time during which the plaintiff should be carrying on business at Tamworth. The words, "either directly or indirectly be engaged or manage or concerned in the office profession or business of a solicitor," which it is not necessary for me to construe, and which I do not intend to construe, in this case, are wider than the words, "settle or practise as a solicitor within the Borough of Tamworth aforesaid or within eight miles thereof," in the agreement of 1903. The radius is reduced by a mile. I do not know the reason for that, but it does not matter. The parties continued in their respective positions under that agreement until 1912, when another agreement dated August 17, 1912, was entered into. That agreement provides for the defendant serving the plaintiff as managing clerk, and contains the following clause (clause 7): "The said Thomas Birch Fitch hereby expressly agrees with the said John Hunt Dewes that he will not on the expiration or sooner determination of the said term of three years or any extended term as herein provided either alone or jointly with any other person or persons directly or indirectly be engaged or manage or concerned in the office profession or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth, but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners' Association at Tamworth or within the aforesaid radius thereof." The agreement also provided for the payment to the defendant of a weekly salary and also of a proportionate amount of the profits of the business. The clause is again different from that in the previous agreement; it is a difference by way of a concession to the defendant that he shall not be prevented from carrying on the legal

business of the North Warwickshire Miners' Association at Tamworth or within the radius mentioned. That agreement was varied by an agreement made in 1914, which gave the defendant a right to open an office at Nuneaton and to receive the profits thereof for his own use, and, of course, he was to pay all expenses, and he was allowed to do the business there as he liked so long as he devoted three days a week at least to the service of the plaintiff. There was also a clause as to an alteration in the date of the termination of the agreement.

That agreement of 1912, as varied by the agreement of 1914, is the one on which the question in the present case arises—namely, whether the restriction as it now exists is unreasonable and, therefore, void. What happened is this. The defendant no doubt found he was hampered by his restrictive covenant, as, indeed, the intention of the covenant was to hamper him. I have no doubt he had read or had had his attention called to the recent decisions upon the question of restraint of trade, in which there has perhaps been an increased tendency of late years to hold restrictions upon an employee bad, and he therefore wished to escape from the restriction.

The parties seem to have been quite on good terms throughout the time, and I think the history of the service and the various agreements show that the defendant was treated, so far as was possible within the limits of the restrictive covenants, with consideration by the plaintiff. The variation between the agreement of 1908 and that of 1912 was in his favour, giving him the right to practise at Tamworth so far as the North Warwickshire Miners' Association was concerned. The difference between the agreement of 1912 and that of 1914 was that he was allowed to open an office at Nuneaton and to devote half of the week entirely to his own business there if he chose, thereby giving him an opportunity of establishing a business in the neighbourhood, although not within the area of seven miles of the Town Hall of Tamworth. Those agreements were all drawn up by the defendant himself, and were by him presented to the plaintiff for approval, and they were approved of by him. As I have said, the restrictive covenants in the articles of apprenticeship were much narrower, and that

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rather tends in the same way to show that the plaintiff was not in any way dealing oppressively with the defendant, because while the defendant was only an articled clerk and had not acquired any great knowledge of the business—by which I mean a knowledge of the connection which the plaintiff had with clients—a small restriction was put upon him. When he was engaged as a clerk a greater restriction was imposed upon him, because he was then in a position in which he saw clients of the business and obtained a knowledge of them which would enable him, if he thought fit, unless there was some restriction, to act, when he left the plaintiff, in a way which would injure the plaintiff's connection and business. The relation between the parties came to an end in 1914, and, as I have said, the defendant found these restrictions were hampering him, and he therefore determined to test the question of the validity of the restrictions by breaking the contract; he in fact said so. The allegation in the statement of claim which is admitted in the defence is this: "The defendant resides in Tamworth"—and he continued to do so after he left the plaintiff's service, although his business was at Nuneaton—"differences have from time to time arisen between the plaintiff and the defendant with reference to clause 7 of the said agreement of the 17th August, 1912, and on the 1st May, 1919, the defendant wrote to the plaintiff as follows: 'As far as the agreement between us is concerned . . . . I intend to break it in order that you shall at once have an opportunity of having our position under it defined.' On the 24th June, 1919, the defendant appeared at the Town Hall Tamworth aforesaid on behalf of John and Edwin Bowman." Whatever may be the construction of this covenant it seems to me that that clearly was a breach of it. I do not intend to deal with the cases that were put before us, hypothetical cases of acts done in Tamworth which might or might not be breaches of this agreement. In my opinion, in any view of it, to appear as a solicitor before the magistrates sitting in Tamworth would be practising as a solicitor in Tamworth.

The only question that remains is whether in these circumstances this covenant is in restraint of trade to such an extent

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as to be contrary to public policy, and ought therefore to be held invalid. There is no doubt, I think, that of late years there has been a tendency to construe these conditions more in favour of the employee than in years gone by; but even now a matter to be considered is whether they have been entered into by a man who was in a position to know what he was doing—that is to say, not a young man entirely under the influence of his master, but a man who knew, or at any rate was capable of judging, what was advantageous for him and what was disadvantageous. In this case there is no doubt that the first agreement or the articles of apprenticeship were entered into by the defendant either when he was just twenty-one or just under that age. As I have said, that contained a small and narrow restrictive covenant. He is now, we have been told, thirty-five years of age, and therefore the agreement of 1912 was entered into when he was twenty-seven, and the variation of it, by which he confirmed it, was entered into when he was twenty-nine. He had been acting as managing clerk to the plaintiff for some time before that, and therefore was perfectly capable of judging for himself what was right and what was not. It is, I think, right to say that it is very important that contracts entered into under circumstances of that kind should not be set aside unless strong reasons of public policy require it. Romer L.J. in *Haynes* v. *Doman* (1) says: "Where a man of sufficient age and business capacity knowingly enters into a contract of service which is only in partial restraint of trade, I think the onus lies on him to prove that it goes beyond what was reasonably necessary." I do not know that that has been enforced quite so strictly of late years as it was some time ago, but I find that in one of the most recent cases in the Privy Council Lord Parker, whose judgments in some of the cases in the House of Lords have been much referred to, took the same view, and therefore it may fairly be said that that is the proper way in which to approach the consideration of a covenant of this kind. In *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2), Lord Parker says: "Though, speaking generally, it is in

(1) [1899] 2 Ch. 13, 30. (2) [1913] A. C. 781, 795.

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the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits." That is the way it seems to me in which to approach this covenant. I think there is only one point about it which is questionable, and that is that it is not limited to the life of the plaintiff or to the time during which he carries on business at Tamworth, but is unlimited in time altogether.

With regard to restriction as to the area I cannot think that any question as to that is arguable. Tamworth is not a large town. It has, I think, between 6000 and 7000 inhabitants, and the only place of any size within the area of seven miles is Lichfield, which has also about 6000 or 7000 inhabitants. There are mining and other villages within the radius of seven miles, bringing up the whole population to about 20,000. It is obvious that as regards area this case is very different from the cases referred to of *Eastes* v. *Russ* (1), *Morris* v. *Saxelby* (2), and *Mason* v. *Provident Clothing and Supply Co.* (3), where the area was enormously larger. I cannot conceive that anything can be said as to this area being unreasonable in extent.

Then it is said that this is a restriction to prevent competition, and to prevent competition only, and that such a restriction cannot be valid. I do not say there may not be an agreement with a servant which would restrain competition only, but to do so it must eliminate the element of the knowledge of the clients of the plaintiff's business which has been acquired by the defendant during his service; and it is extremely difficult to eliminate this element in any case. It is impossible here, because a managing clerk acting for his master and having control when his master is away,

(1) [1914] 1 Ch. 468. (2) [1916] 1 A. C. 688.
(3) [1913] A. C. 724.

and seeing all the clients of the firm, evidently must acquire a knowledge of the connection and of the master's business which cannot be separated from his own knowledge and skill in the profession. Therefore, in my opinion, this cannot in any sense be said to be a restrictive covenant to prevent competition alone.

It therefore comes back to the question whether the fact of the time being unlimited is enough to make an agreement, which is otherwise reasonable, unreasonable for the protection of the master? It is not necessary to cite the words of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (1), which have been read over and over again. I adopt them. Is this a reasonable covenant, having regard to the interests both of the parties and of the public? I agree entirely with Eve J. in what he says as to the interests of the public. I can see no injury to the interests of the public by this gentleman being restricted from practising within the narrow area of seven miles from Tamworth Town Hall. He may have his clients from there if he likes; there is nothing to prevent him from so doing; any persons who wish to instruct him may do so if they choose at Nuneaton, although they live at Tamworth, but he must not practise as a solicitor within that area. That is no injury to the public.

Then, is the covenant unreasonable so far as the defendant and the plaintiff are concerned? To decide that point I do not think I can do anything better than refer to the decision of Tindal C.J. in *Hitchcock* v. *Coker*. (2) As I said, during the argument, it is inevitable that in practically every case that comes up for decision on a covenant of this kind between master and servant *Hitchcock* v. *Coker* (2) should be cited and discussed. That was a case in which a covenant unlimited as to time was held to be good by the Exchequer Chamber, reversing the decision of a strong Court of King's Bench which had held the other way. The question having been discussed over and over again since that decision, both before and after what is called the modern tendency had arisen, I was anxious

(1) [1894] A. C. 535. (2) 6 Ad. & E. 438.

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to know whether any opinion had been expressed in any of those cases that the decision of the Court of King's Bench was right and the decision of the Exchequer Chamber was wrong. I was told, and as far as I can ascertain, quite correctly, that no such comment had ever been made upon it, and therefore it remains an authority of the Exchequer Chamber often discussed and often canvassed and never, as far as I can find out, adversely criticised. That was not a case of a solicitor, no doubt, but of a druggist, and the restriction on the defendant there was from exercising the trade or business of a chemist and druggist in the town of Taunton or within three miles thereof under certain penalties. In answer to the objection that the restriction being unlimited it must be bad, Tindal C.J. said (1): "The ground upon which the Court below has held this restraint of the defendant to be unreasonable is that it operates more largely than the benefit or protection of the plaintiff can possibly require; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on his business at Taunton, nor even to the term of his life. We agree in the general principle adopted by the Court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void. But the difficulty we feel is in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But with respect to the duration of the

(1) 6 Ad. & E. 453.

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restriction the case is different. The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such goodwill, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life." That judgment, as I have said, has borne the test of very considerable discussion. There are cases, no doubt, in which a restriction unlimited in time and applying to an enormous area has been held to be too wide to be reasonable. It is stated by Lord Lindley, then Master of the Rolls, and also by Rigby L.J. in *Haynes* v. *Doman* (1), that there is no case in which, where the other elements are held to be reasonable, the mere want of limit of time has made a covenant unreasonable, and we are told it is still so. Of course, there is this difference in applying a case of that kind, that the two things work together. The unlimited time may be reasonable in a small area, but unreasonable in a very wide area, and therefore you must look at the area and the

(1) [1899] 2 Ch. 13, 23, 28.

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time together; but it certainly is the case that no authority can be found for the avoiding of a covenant of this description on time alone; and there are a number of cases (where the point, no doubt, was not specifically raised) of covenants which have been enforced between a solicitor and his clerk where the time has been unlimited and where the area has been narrow. It must be a question in each case of what is the position of the parties, and what is reasonable as between them in the circumstances. In this case in the circumstances that I have endeavoured to state and for the reasons I have given I agree with Eve J., that the restriction was not unreasonable, that is, that it was not too wide for the proper protection of the plaintiff, nor against the interests of the public, and therefore that it was one which bound, and does still bind, the defendant. I think therefore that the injunction as granted by Eve J. must go, and the appeal must be dismissed with costs.

WARRINGTON L.J. This is an appeal from an order of Eve J., by which he granted an injunction restraining the defendant from, to put it shortly, practising as a solicitor at Tamworth in breach of an agreement entered into by him with the plaintiff some years ago. The question has been raised in this as in so many other cases, whether the agreement which it is sought to enforce is one capable of being enforced according to the principles of our law. The agreement unquestionably falls within the class of agreements which are generally denominated agreements in restraint of trade; and as such, therefore, it would be unenforceable by legal process unless it satisfied certain conditions which are necessary to its enforceability. Those conditions, as has been often pointed out, are that the agreement must be reasonable in the interests of the parties to it, and reasonable also in the interests of the public—that is to say, not injurious to those interests. The principle to which I have just referred has often been enunciated and, I think, the passage which is most generally referred to in support of it is that in the judgment of Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt*

Guns and Ammunition Co. (1); but it has recently been stated by Lord Parker in *Morris* v. *Saxelby* (2), also in the House of Lords. Whether it is reasonable in the interest of the parties is the first question that has to be determined, and I think that it is true that in determining whether it is so reasonable one must look first at the position of the employer. A contract is reasonable in his interest if it is no wider than to afford him adequate protection, but, as Lord Parker points out, before one can decide whether a certain provision is reasonable or not one must find what it is for which protection is required and what it is against which it is reasonable to require protection. It is in the consideration of that question that there have been made, particularly in *Morris* v. *Saxelby* (3), to which I have already referred, the statements of several noble and learned Lords, that the employer is not entitled to require protection against mere competition. What he is entitled to protection against is the use by the employee against him in his business of knowledge obtained by him of his employer's affairs and the influence acquired by him over his customers in the course of an ordinary trade, and, in the case of a professional man, over what is more commonly called his clients. Lord Parker puts it in this way (4): "I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained." It is the trade connection for which protection is required, and it is against the undue invasion by a person who

(1) [1894] A. C. 535.
(2) [1916] 1 A. C. 688, 708.
(3) [1916] 1 A. C. 688.
(4) Ibid. 709.

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has had special opportunities for that invasion of the trade connection that the protection is required, and if the protection given is no more than adequate for the purpose for which it is given then it would be reasonable.

I turn now to the circumstances of the present case. The plaintiff is a solicitor who has for many years been in practice in Tamworth. In the year 1899, rather more than twenty years ago, he took the defendant into his employment, apparently as a mere boy and probably shortly after he left school. In 1903 he gave him his articles. As soon as the defendant had duly qualified as a solicitor he employed him as his managing clerk, making the first agreement for that purpose in the year 1908. That agreement continued until August 17, 1912, when the agreement now in force was made, which was subsequently slightly modified, as will hereafter appear. That agreement, so far as the present question is concerned, provides: "That the defendant will not on the expiration or sooner determination of the said term of three years or any extended term as herein provided either alone or jointly with any other person or persons directly or indirectly be engaged or manage or concerned in the office profession or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners' Association at Tamworth or within the aforesaid radius thereof." That agreement was afterwards modified by an agreement of February 5, 1914, not so far as that provision was concerned, but in other respects in which it was made more favourable to the defendant. For example, he was allowed to carry on during his employment with his master his business with the North Warwickshire Miners' Association in Tamworth. He was also allowed to set up an office of his own and conduct his own business at Nuneaton, giving only three days a week to his master's work, and when that modification was made it was expressly provided that the old agreement should in other respects continue in force. All these agreements were drawn up by the defendant himself, and there is no suggestion

of pressure or anything of that kind. The defendant knew perfectly well what he was doing when he entered into the agreement of 1912, and presumably he did not think it unreasonable at the time. I think, perhaps, I ought to have said that if the agreement is reasonable from the point of view of the employer it is also usually reasonable from the point of view of the employee, because it is to the interest of the employee to be able to contract or enter into such a contract as will give his master reasonable protection, as otherwise it would be impossible for him to obtain employment, certainly in any confidential capacity.

Now, is this agreement unreasonable? Just consider what it is. The defendant is about to become the managing clerk of a solicitor. We all know that a managing clerk of a solicitor has innumerable opportunities of becoming acquainted with the personality of his employer's clients, and with their business, and of acquiring a knowledge of many matters connected with them which they would not desire to be known to everybody, and the agreement specially mentions the clients' secrets. I think nothing is more likely than that if the defendant were to be permitted to set up in, or very near, the same place as that in which his master was practising he would obtain a great part of the business which had been the master's, and with which he had become familiar during the period of his employment. In fact it is not seriously contested that in the present case the agreement is a reasonable agreement so far as the radius of practice is concerned. The real attack made upon the agreement is that the absence of a limit of time renders it unreasonable. With regard to that it is admitted that there is no case in which it has been held that a restriction, reasonable in itself, has been held unreasonable by reason that it continues during an unlimited time—that is to say, during the lifetime of the person to whom it applies. I think there is a very good reason why such a case has never been found. It was pointed out in *Hitchcock* v. *Coker* (1) by Tindal C.J. in delivering the judgment of the Court of Exchequer. His remarks being those of a business man are

(1) 6 Ad. & E. 438, 454.

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for this purpose as pertinent to-day as in 1837, when they were made. [The Lord Justice read the latter part of the passage already cited in the M.R.'s judgment, p. 178 ante, and continued:] In reference to that last passage it has been contended before us that it goes too far, and that many events may happen, which would render such a restriction unnecessary or of no force. That may be so: but what the parties in a case like this were considering, and what we have to consider when we are discussing the reasonableness or unreasonableness of such a provision is, what, in the ordinary course of things, is likely to happen—what is it against which the parties would ordinarily wish to provide and not some more or less fanciful or imaginary things which may happen. In my judgment in such a case as this it is reasonable in the interests of a master that not only the goodwill of his profession so long as he is carrying it on should be protected, but that he should be enabled so to maintain it as to hand down its value to those who come after him, whether they be partners, purchasers, or executors, or whatever they may be. I think therefore that this agreement, which is eminently reasonable in other respects, is not rendered unreasonable by the fact that the restraint is imposed during the life of the defendant.

There is one other matter I desire to mention. It has been urged before us that the agreement may be so construed as to make the doing of certain isolated and more or less trivial acts which are done by a solicitor a breach of it. I desire to express no opinion upon the construction of the agreement in that respect. Whether or not what the defendant does is a breach of the agreement is a matter that will have to be decided when he does it, and on the finding of a particular act on which the question arises. That he has broken the agreement for the purpose of the present action, and broken it purposely and deliberately, and with the object of raising the question of its validity, there can be no doubt. That is quite enough for the present purpose. I shall be quite ready to construe the agreement as to its extent if and when the question arises whether what has been done is a breach of it. I agree with Eve J. that this agreement is a reasonable

agreement, and therefore, although in restraint of trade, it is capable of being enforced, and that the injunction was rightly granted.

YOUNGER L.J. I am of the same opinion. Recent decisions in the House of Lords and in the Privy Council, while not altering the statement of the principle by reference to which the question must always be answered whether such a restrictive covenant as that with which we here have to deal is in undue restraint of trade, have, I think, worked a practical revolution in previously current judicial views so far as they concerned the validity of such covenants when contained in contracts of service. This revolution has been effected by the higher tribunals insisting, in these cases, on the essential distinction in circumstance between the position in relation to such covenants of an employee in a business and of a vendor of his goodwill, and even on the distinction in circumstance between one class of employee and another. Restrictive covenants imposed upon an employee which a few years ago would not have seemed open to question would now, I think, with equal certainty be treated as invalid. The question therefore with which we are here concerned is whether these covenants, objections to whose validity would not have been listened to a few years ago, can still survive. Now putting it broadly, the change in the judicial view of such covenants is based upon the proposition now clearly laid down by the highest authority, that while a purchaser of the goodwill of a business may properly protect himself by covenant from the competition of his vendor, it is not permissible for an employer to protect himself merely from the competition of his former servant after his service has terminated. It is permissible for the employer by covenant to protect his trade or professional secrets and to protect himself also against his clients being enticed away by his former assistant: in other words, to protect his connection. This remains permissible, but the Courts, I think, now regard even such a covenant with jealousy. They are suspicious of cases where the employee's remuneration being returned in faithful service that service is rewarded

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when it is over, not by a gratuity but by a restriction. The House of Lords, moreover, has emphasized the necessity for careful scrutiny in the case of such covenants for two other reasons; one in the interest of the employee and the other in that of the public. The first reason is that in very many of these cases the two contracting parties are not at arms' length. The employee is practically compelled, and often for very inadequate consideration, to accept any terms the employer may seek to impose upon him without, in many cases, knowing or appreciating what they involve. And the second reason is that such covenants in an extreme form may practically compel a servant to continue his service with an employer on terms which may no longer be advantageous by reason of the fact that the covenant, if enforced, would, when he leaves, prevent his obtaining beneficial employment elsewhere.

Now here the effective covenant is open to neither of these objections. It was in fact prepared by the defendant himself and was accepted by the plaintiff in the terms in which it was drafted by the defendant. The defendant at the time was a competent solicitor, who admittedly thoroughly well knew to what he was agreeing. Moreover, the case is one in which some protection of the plaintiff's business was admittedly specially necessary. In these circumstances a view of this bargain which would reduce to so much waste paper a covenant so entered into in such circumstances could only be justified as a desirable result by the certainty of most substantial public injury if it be enforced. Is then any such public injury to be apprehended? I think not. The range of permitted activity reserved to the defendant is ample for the energies of any solicitor, however eager. In my judgment any objection to the covenant on this score is extremely remote. Lastly, the terms of this covenant, reasonable as it is so far as area is concerned, are in my judgment, with one possible exception, plainly framed with the object and effect of protecting the plaintiff's connection, and are, therefore, permissible even within the principle of the recent cases referred to. The statement in the covenant of what the defendant may not do

is substantial and general. It is not meticulous or detailed. It appears to me to be eminently businesslike, having regard to the purpose for which, as I think, it was entered into. Moreover, there are special and particular circumstances in this case which show that some protection for the plaintiff was specially called for. There was an altogether exceptional confidence reposed in the defendant so far as the conduct of the plaintiff's business was concerned, and his knowledge of that business in all its details and of the circumstances of all the plaintiff's clients was intimate and exact. Further, the defendant has always resided in Tamworth, and under the terms of the exception from the covenant it was contemplated that he would for a limited purpose and for a specified client continue to act as a solicitor in Tamworth itself. In point of fact to the extent of that limited exception it was contemplated by the parties, and it has turned out to be the fact, that the defendant might remain in practice within the area. These circumstances, together and separately, show, to my mind, that there was, as I have said, special and particular reason why the plaintiff for the protection of his own business should have required some such covenant from the defendant.

But the covenant is for the period of the defendant's life. Does that circumstance make it void? Certainly no other circumstance in connection with it seems to me to throw any doubt whatsoever upon its validity. Now the observations of Tindal C.J. in *Hitchcock* v. *Coker* (1) which have been read by the Master of the Rolls have not, in any subsequent case, been overruled or dissented from; and while I am myself far from saying that in view of these recent judgments in the House of Lords and Privy Council there may not be some cases (and indeed prior to these judgments *Eastes* v. *Russ* (2) may be taken as one) in which a life-long restriction imposed upon a servant after leaving his service might be fatal to the covenant, I can see no reason why the view of the Exchequer Chamber in *Hitchcock* v. *Coker* (3), not hitherto dissented from, should not be followed here. On the contrary, I think that

(1) 6 Ad. & E. 438, 453. (2) [1914] 1 Ch. 468.
(3) 6 Ad. & E. 438.

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if that view can, in a contract of this kind, ever be properly applied, it ought to be applied in the present case, because I think that applying it even in the most extreme and improbable event, there would not be in fact imposed upon this defendant any restriction of which he can reasonably complain. It was said by Mr. Clayton in his argument in support of the appeal that one of the main objections which he took to the covenant was that not only did it prevent the defendant from carrying on his profession as a solicitor within this prohibited area during the lifetime of the plaintiff and during the continuance in the hands of a successor of the plaintiff's business, but that it also prevented the defendant from practising within this area during the rest of his life, whether any business was being carried on by the plaintiff or any successor of his in that area at all. Now, like my Lord and the Lord Justice, I am not going to say a word about the particular acts which this covenant prevents the defendant from doing, but on that point I should just wish for the information and possible warning of the parties to draw their attention to the decision of Farwell J. in *Townsend* v. *Jarman* (1), which at least lends some colour to the view that in the event of the business of the plaintiff, as carried on by himself or by a successor, ceasing to exist, the covenant also would disappear.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for James, Barton & Kentish, Birmingham.*

Solicitors for respondent: *Andrew, Wood, Purves & Sutton, for J. H. Dewes, Tamworth.*

(1) [1900] 2 Ch. 698.

W. I. C.

DAVIES *v.* THOMAS.

[1919. D. 517.]

C. A.
1920
April 29, 30.

Action, Cause of—Workman—Combination of Employers—Rules—Protection of Trade Interests—Procuring dismissal of Employee—Motive—Coercion—Peaceful Persuasion—Restraint of Trade.

An association of traders in a particular district were bound by a rule which provided that "on an employee leaving an employer, who is a member of the Association, the employer shall (if so desirous) report the same to the secretary, who shall advise all the members, and no other member of the Association shall employ or supply him for 12 months." The plaintiff, a traveller, left the employment of W., the secretary of the Association, and entered the service of H., another member, to whom he transferred customers whom he had secured for W. W. called a meeting of the association and reported the matter. At the meeting H. was persuaded by W. and other members to give the plaintiff notice to terminate his employment. His dismissal was not obtained by any illegal means, i.e., coercion, intimidation, threats or undue influence.

In an action by the plaintiff against W. and the other officials of the association for damages and an injunction to restrain them from interfering with him in his calling:—

Held, that upon the facts of the case and applying the principle of *Allen* v. *Flood* [1898] A. C. 1, the plaintiff had no cause of action against the defendants.

Decision of P. O. Lawrence J. [1920] 1 Ch. 217 affirmed.

APPEAL from a decision of P. O. Lawrence J. (1) dismissing an action in which the plaintiff claimed an injunction to restrain the defendant from interfering with him in the exercise of his calling of a traveller in the yeast trade.

The facts are fully stated in the report in the Court below.

Schwabe K.C. and *Roope Reeve* for the appellant. Where a body of employers combine with the object of inducing by pressure one of their number to discharge an employee, and so to interfere with his carrying on his occupation as he will, that is an actionable wrong. Rule 20 of this association is admittedly void, as being in restraint of trade: *Mineral Water Bottle, etc., Society* v. *Booth*. (2) The inference from

(1) [1920] 1 Ch. 217. (2) (1887) 36 Ch. D. 465.

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the facts in this case is that the members of the association agreed together to prevent any ex-employee of a member from earning his living in this trade if his former employer requested that it should be done. If an employee left his employer and set up in business for himself, under rule 20 no member was to supply him with goods, or if he entered the employment of another he was to be discharged. Such an arrangement as that is clearly illegal and actionable if damage ensues. It is true there was no threat to Hopkins. There is no express power to expel from the association, but the members could make themselves exceedingly disagreeable to anyone refusing to adhere to the rules.

[LORD STERNDALE M.R. Has the learned judge found that there was any intention on the part of the members to injure Hopkins in his business if he did not obey the rule ?]

No; but the meeting was called to enforce rule 20, and pressure was brought to bear on Hopkins.

[WARRINGTON L.J. The learned judge has found that no illegal means were used and that the act induced was not illegal.]

It is submitted that a combination of persons to interfere with the plaintiff's liberty to earn his living in his own way is prima facie unlawful.

[YOUNGER L.J. If three persons mutually agree that each of them will, if so required by the other two, give notice to his employee to terminate his engagement, and that neither of the other two will employ him, would that give the employee any right of action ?]

It is submitted that it would. There is a recognized right for a man to dispose of his labour as he pleases without obstruction or interference by others. The question is what interference with that right is actionable.

(1.) An inducement not to employ brought about by violence or threats is clearly actionable.

(2.) An inducement, without threats, to break a contract is also actionable if there be no just cause for the inducing.

(3.) Where there is no threat or violence and no contract broken there may be a question whether there is any right

of action in such a case: see per Lord Loreburn L.C. in *Conway* v. *Wade*. (1)

If there is an oppressive combination necessarily resulting in injury (excluding intention or motive) by inducing persons not to deal with another, without the excuse that the inducers are merely exercising their own correlative rights, that is actionable: *Valentine* v. *Hyde*. (2)

[YOUNGER L.J. You say that there is a conspiracy to make effective a restrictive covenant which could not be enforced by any of the parties to it.]

Yes, that is the submission. A combination of two or more, without justification or excuse, to injure a man in his calling is actionable if damage results: *Quinn* v. *Leathem*. (3) That was the converse case of a combination of workmen to injure an employer.

In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (4) it was held that the plaintiffs had no cause of action because the acts of the defendants were done with the lawful object of protecting and extending their trade. But see *Larkin* v. *Long* (5); *Giblan* v. *National Amalgamated Labourers' Union*. (6)

What is justification in a case like this? The learned judge relied upon the fact that rule 20 was inserted in the rules with the sole object of benefiting the members of the association in their respective businesses. But that has been held not to be the law: *South Wales Miners' Federation* v. *Glamorgan Coal Co*. (7) The supposed interest of the inducers is not sufficient justification: *Larkin* v. *Long*. (5)

An accurate summary of the law is given by McCardie J. in *Pratt* v. *British Medical Association*. (8)

There is no distinction between claims for inducing persons to break contracts already entered into with the plaintiff, and for inducing persons not to enter into contracts with the plaintiff. Both are maintainable in law: *Temperton* v. *Russell*. (9) The principle running through the boycotting

(1) [1909] A. C. 506, 510.
(2) [1919] 2 Ch. 129, 138.
(3) [1901] A. C. 495.
(4) [1892] A. C. 25.
(5) [1915] A. C. 814, 843.
(6) [1903] 2 K. B. 600.
(7) [1905] A. C. 239, 244, 246.
(8) [1919] 1 K. B. 244, 265.
(9) [1893] 1 Q. B. 715, 728.

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cases is the same as that which governs the cases on enforcing covenants in restraint of trade: *Morris* v. *Saxelby*. (1)

Rule 20 in this case resembles the rule in *Mineral Water Bottle, etc., Society* v. *Booth*. (2) The reason why the agreement was held to be void in that case was that it was contrary to public policy which does not allow a man to be prevented from carrying on his lawful avocation. The gist of this case is that there was an unlawful conspiracy in pursuance of a void rule to prevent the plaintiff from carrying on his calling: see per Lord Brampton in *Quinn* v. *Leathem*. (3)

To procure from others an agreement not to employ a particular man or to discharge him is equivalent to industrial murder of the man, and is void as against public policy. If two or more agree to do it there is a conspiracy to destroy the man's legal right to employ his labour as he likes: *Read* v. *Friendly Society of Operative Stonemasons* (4); *Conway* v. *Wade*. (5)

[LORD STERNDALE M.R. referred to *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (6)]

McCardie J. said in *Pratt's Case* (7) that that rested on the same footing as the *Mogul Case*.

The judgment of the learned judge in this case is misconceived, (1.) because he omits altogether to deal with the proposition that it is an actionable wrong to interfere with the right of another person to carry on his calling as he will; and (2.) because he holds that the supposed interest of the inducers is sufficient justification for the acts complained of.

Jenkins K.C. and *C. Lyttelton Chubb* for the respondents were not called upon.

LORD STERNDALE M.R. This is an appeal from P. O. Lawrence J. in an action brought by the plaintiff Mr. Davies, against four defendants—William Thomas, Jonah Reynolds, William Rice and Thomas David Williams. The facts are stated very accurately in the report in the Court below (8)

(1) [1916] 1 A. C. 688.
(2) 36 Ch. D. 465.
(3) [1901] A. C. 495, 525, 526.
(4) [1902] 2 K. B. 732.
(5) [1909] A. C. 506.
(6) (1898) 35 Sc. L. R. 645.
(7) [1919] 1 K. B. 244, 264.
(8) [1920] 1 Ch 217.

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and I do not propose to repeat them at any great length. It is an action to restrain the defendants "from interfering in any manner howsoever with any person or persons company or corporation with a view to causing such person or persons company or corporation to break his or their contract or contracts with the plaintiff or to cease to employ or supply him or to abstain from entering into contracts with him." The facts, so far as I think it necessary to state them, are these: The plaintiff entered into the employment of the last-named defendant, Mr. Williams, as a traveller or agent in Mr. Williams' business, which was that of a yeast dealer. There was some discussion about a restrictive covenant being inserted in his agreement, binding him not to compete in various ways mentioned in the clause, but although the plaintiff signed it he never sent the signed agreement to the defendant, and it is admitted that the employment continued upon the footing of there being no restrictive agreement at all. The plaintiff and all the defendants were also yeast dealers, and they were members of a certain association called the West and Mid-Wales Yeast Dealers' Association, which had primarily for its object the protection of the members of the association. The rules of the association contained a rule to which I shall have to refer later. Mr. Hopkins, who is not a party to the action, was also a member of the association. Before the plaintiff left the defendant's employment, there had been communications between the plaintiff and Mr. Hopkins with the view of effecting an agreement between them by which the plaintiff would enter into Hopkins' employment, and he eventually did so. He had not, I think, been in the yeast business before he entered the service of the defendant, but during his service he established a considerable connection, and the object of the plaintiff in going to Mr. Hopkins was that he should take with him a considerable part of that connection. In fact, to do him justice, the plaintiff does not in the least deny that. He says that while discussing this arrangement with Mr. Hopkins he mentioned the business he had been doing for the defendant, and he said he thought that Mr. Hopkins regarded

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that connection as being a matter which might be valuable to him, Mr. Hopkins. He was asked this: "At any rate, you had the intention, you yourself, of canvassing the customers whom I may call the customers you got for Mr. Williams? (A.) I intended to canvass anybody and everybody, and that is what I actually did. (Q.) And you used your own connection for all it was worth, did you not? (A.) I used it for the first fortnight for all that I was worth, and then when this friction started . . . ."—that was the friction with Mr. Hopkins, because he had engaged the plaintiff—" when the friction started . . . ." then the answer stops. But there is no doubt he meant to go on and say, " when the friction started, I ceased doing so." Then he is asked whether there were certain customers at Briton Ferry, whom, he said, he did not obtain for Mr. Williams and a share of whose business he admitted he took over to Mr. Hopkins. I do not think it is necessary to state any more than that. The plaintiff was doing what it was his legal right to do. There was no restrictive covenant in his agreement with Mr. Williams, and therefore he was justified in taking his connection over to Mr. Hopkins if he wished. Whether it was a fair thing to do, I express no opinion upon at all; but it is obviously a thing which Mr. Williams might object to. When I say " object to," I do not mean legally, but he might resent. It is equally clear that if it became a practice amongst the employees in the trade, it would be a thing to which all the people in the trade and all the members of the association might take exception, and they did take exception. Mr. Williams seeing the plaintiff canvassing for Mr. Hopkins, wrote him a letter in which he called what he was doing " a dirty action," " anything but straightforward and honourable," and he wrote two or three days afterwards to Mr. Hopkins, asking him to give immediate notice to terminate the plaintiff's engagement, and saying that if he did not do so he, Williams, would bring the matter before the association. Mr. Hopkins refused to give that notice, and thereupon the defendant, Williams, issued a notice convening an emergency meeting of the association, and put upon the notice this agenda: " To

consider a reduction in the price of yeast and the necessity of members complying with Rules 18 to 20." Rules 18 and 19 had nothing to do with this case, but 20 is the rule to which I have already referred and which I have now to read; it is this: "On an employee leaving an employer who is a member of the Association, the employer shall, if so desirous, report the same to the Secretary, who shall advise all the members, and no other member of the Association shall employ or supply him for twelve months." That is a rule which according to the *Mineral Water Bottle, etc., Society* v. *Booth* (1) would be void, as being contrary to public policy. The meeting took place, and there was an animated discussion between Mr. Hopkins on the one side and the defendant, Williams, and other members of the association on the other, and many members expressed their opinion that Mr. Hopkins had done a dirty action in engaging the plaintiff and pressed him to put an end to the engagement, and to give notice, as he was entitled to do, to the plaintiff. When I say "pressed him," I mean, pressed him without any coercion or threat, but urged him to do so. He refused. The consequence was that they carried a resolution that a small committee should be formed to get the question in dispute between Mr. Hopkins and Mr. Williams settled, and three members who were present were chosen to act as the committee, the defendant Thomas, who was, I think, the chairman or, at any rate, an official of the association, being one, but none of the other defendants being upon the committee. That committee never met and never acted, for this reason, that after the committee had been appointed, the members all went to tea and the matter was again discussed, but no conclusion was arrived at. After tea most of the members, including all the defendants except Mr. Williams, that is, the defendants, Thomas, Reynolds and Rice, left, but the discussion was continued by the remaining members and, ultimately, Mr. Hopkins promised to give the plaintiff a month's notice to terminate his engagement. The notice was given, and, according to the learned judge, caused the

(1) 36 Ch. D. 465.

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plaintiff damage to the extent of 25*l.* The learned judge accepted the evidence of Mr. Williams as to what took place at the meeting, and after the meeting, and what took place up to the time when Mr. Hopkins consented to give notice to the plaintiff, and as he accepted that evidence, I think I am justified in treating it as a true account of what took place. [The Master of the Rolls then referred to the evidence and continued:] On that the learned judge finds this: That there was no threat and no coercion employed at all. Of course, at the time when Hopkins consented to give the notice, the three defendants, other than Williams, were not present at all, but the plaintiff's case is that the pressure had been exercised at the meeting, and that the pressure which was exercised lasted until the agreement to give the notice was arrived at. He doubts very much, upon the evidence, whether there was any evidence at all against the defendants, other than Williams. I rather share that doubt. But he has found, as I say, that there was no pressure, no threat and no attempt at coercion. I have not the slightest doubt that it was present to the learned judge's mind, just as much as it must be to everybody's, that you may have threats and coercion and pressure without any actual threats or intention to exercise coercion being put into words, and I have no doubt he considered that and considered all the circumstances before he arrived at his conclusion of fact. Mr. Hopkins was not called. Therefore, the only evidence of what took place at the meeting was the evidence of Mr. Williams, accepted by the learned judge, and I do not see my way to differ from his finding on the evidence that there was no coercion and no attempt at coercion or pressure on the part of any of these defendants. There may be said to have been evidence both ways in this sense, that it was contended that the position which the defendants occupy, some of them as officials and all of them as members of the association, was such as of itself would constitute their acts coercion. The learned judge has considered that, and has come to the conclusion that in the circumstances it did not, and I must accept that finding also.

Now the question we have to decide is whether, upon those

facts, the plaintiff has established a cause of action. That being the nature of the action, we have been taken through all the cases and all the discussions on *Allen* v. *Flood* (1), *Quinn* v. *Leathem* (2), *Conway* v. *Wade* (3), and all the others that have any bearing upon this matter. If I do not discuss those authorities at length it is not from any disrespect to the argument that has been addressed to us, but because I think that this case depends upon its own facts, and it does not require any statement of all the principles that may govern a variety of actions of this kind. With regard to an individual, in cases of this kind, they are stated by Lord Watson in *Allen* v. *Flood* (1), in a passage which has been several times referred to, in these words: "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor"—that is the instance which applies to this case. Hopkins was entirely within his legal rights in giving notice to the plaintiff—" and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (4), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party." That states that the mere inducement to break a contract is in itself actionable. The inducement not to employ is actionable only if it proceeds by illegal means, and the illegal means generally used in these cases is pressure, coercion for the purpose of injuring the third person referred to in that statement. I do not think that the principle differs in the case of the inducement being effected or procured by a number of persons except to this extent, that it is much easier to infer pressure or coercion in the case of a number of persons, especially if they are in

(1) [1898] A. C. 1, 96.
(2) [1901] A. C. 495.
(3) [1909] A. C. 506.
(4) (1853) 2 E. & B. 216, 232.

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a position to make themselves objectionable if their request is not complied with, than it is in the case of a single person. I think this is shown in the first place by *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), and also by *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (2) referred to by Lord Lindley in *Quinn v. Leathem* (3). Those were cases of competition, and competition was held to be a perfectly legal means of interfering with another person's business. This, of course, is not a case of competition, but I think those cases show that the principle that in a case of this kind the means used must be illegal applies as much to an inducement by a number of persons as to an inducement by one.

A very wide proposition indeed was contended for by the appellant in this case, a proposition which, I think, may be put in these words, that where you have a number of persons combined, any act done by them in combination to induce one person not to deal with another, or not to employ another, is actionable. I do not assent to that proposition, and I think it is contrary to the principles that are laid down in all the cases to which we have been referred. Therefore, I think we have really to examine here whether any illegal means were in fact used by these persons.

It was argued that we must say so for this reason, that, this rule being contrary to public policy and therefore bad, these persons who purported to act upon it were entering into an illegal and wrongful conspiracy, because they were combining to carry out something which was contrary to public policy, to the injury of another. I do not think myself that upon the facts as found by the learned judge such a case arises. It is for that reason that I do not go into the authorities at any length. There was no evidence, so far as I can see, when Mr. Hopkins was asked and persuaded to give notice to the plaintiff that all the members would abide by the rule and nobody would employ him. There was not even an attempt to induce Mr. Hopkins to give him notice in any event. What he was asked to do was to give him notice unless

(1) [1892] A. C. 25. (2) 35 Sc. L. R. 645.
(3) [1901] A. C. 495.

he was prepared to give up employing the plaintiff for the purpose of canvassing the defendant's customers. If he did that, there was no objection to his continuing to employ the plaintiff. Therefore, I do not think that that general question arises; and as the learned judge has found that there was no coercion, no threat, either express or implied, no improper pressure and nothing really but a request and persuasion, and no illegal means were employed, the plaintiff has not established his cause of action. My judgment proceeds entirely upon the facts of this particular case, as found by the learned judge and as disclosed in the evidence.

I think, therefore, this appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The facts found by the learned judge, and it is on those facts that I think this case must be decided, resolve themselves into this: The plaintiff, Davies, was, on March 6, 1919, in the employ of a man named Hopkins, subject to a month's notice to determine his employment. Davies had until a week or two before Hopkins engaged him, been in the employment of the defendant, Williams. He occupied with Hopkins the same capacity as that which he occupied with Williams—namely, that of canvasser for orders for goods sold by them respectively, which were the same class of goods. He had quite lawfully taken to Hopkins and away from Williams a certain amount of the business which he had previously procured for Williams, so that Williams' business had been hampered and injured by the fact that his servant, Davies, had gone over to Hopkins, as his rival in trade. Under these circumstances on March 6, 1919, Williams and certain other persons who are not parties to the action succeeded in persuading Hopkins to yield to their representations and to give a month's notice to Davies terminating his employment. Davies then brought this action against the defendant Williams and three other persons, not those whose representations had the success to which I have referred, but certain other persons, alleging that Williams and those

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persons, who are made defendants, had, by means of improper pressure, interfered with Davies' means of obtaining a livelihood, by obtaining his dismissal from Hopkins' employment. Williams, and the three persons who succeeded with him in persuading Hopkins to take the course he did, so succeeded, as the learned judge has found, using no threats, no coercion, no improper pressure or other illegal means, and the learned judge has therefore found that that being so Williams, who is the only one of those persons sued by the plaintiff, is not liable to the plaintiff for any damage which has been occasioned to him by what was done. Now is that right or not ?

Before I come to examine the law which, for this purpose, I think, is quite settled, I would just point out this : These other defendants were sued by the plaintiff and are still defendants in the action, and respondents to the present appeal; a man named Thomas, another named Reynolds, and a third named Rice. They held respectively the positions of chairman, vice-chairman and treasurer of a certain association of traders to which I shall have to refer presently, and it is alleged against them also that they, by the use of improper means, induced Hopkins to dismiss Davies. The fact with regard to them is that they did no such thing. They attempted also by representations without threats, without coercion, without using any illegal means, to induce Hopkins to dismiss Davies, but they did not succeed. To their representations Hopkins returned a positive refusal, and therefore, in any case, there could be no possible cause of action against these persons, because all that they did was devoid of success, and they never in fact injured the plaintiff.

The law applicable to this case is laid down in plain terms and with extreme simplicity in the speech of Lord Watson in the famous case of *Allen* v. *Flood*. (1) [The Lord Justice read the passage cited above by Lord Sterndale M.R. and continued :] Applying that to the present case, the act which Williams and the other persons procured to be done was not an illegal act ; it was an act within the contractual rights

(1) [1898] A. C. 96.

of Hopkins, because Davies was in his employment, subject to a month's notice, and he gave him a month's notice. Then it cannot come within the first branch, as stated by Lord Watson. If it is to be brought within the second branch then it is incumbent upon the plaintiff to show that the act in question, not being itself illegal, has been brought about by the use of illegal means. The learned judge has found in terms that no illegal means were used. Therefore it does not come within the second branch of the rule, as stated by Lord Watson. But I have so far omitted from consideration one fact—namely, that the persuasion and the representations were employed and made, not by one person only, but by two or more acting in concert. Does that make any difference? In my opinion it does not. If I see that a man is employing a person under circumstances which make it, in my opinion, not quite fair or right that he should be employing him, am I committing an illegal act because I get a man who also holds the same opinions to go with me and we together represent to the employer that he is not doing what he ought to do? I think that can only be answered in one way. It seems to me, therefore, on the facts, as I have stated them, which I think are in substance as found by the learned judge, that the plaintiff could have no right of action against these defendants. But I must not dismiss it quite so shortly as that. It may be that, if a great number of persons are engaged in the transaction, from that fact you may be able to infer pressure, and conscious pressure or unconscious influence, which it would be impossible to infer from the act of one person by himself. I do not deny that that may be so, and, in that sense, the fact that the inducements are used by more persons than one may become a material element, but it is excluded in the present case, because the learned judge has found on the facts that there was no undue pressure or undue influence of any sort. Therefore in this case at any rate, the fact that the persuasion was used by several people acting together is immaterial. But then it is suggested that what was done was in pursuance of an unlawful conspiracy because the

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parties in question were all members of the association, the rules of which include a rule to this effect: "On an employee leaving an employer who is a member of the Association, the employer shall, if desirous, report the same to the Secretary who shall advise all the members, and no other member of the Association shall employ, or supply him for 12 months."

I do not comment on the English of that rule, though a good deal might be said about it, but I think the fair result of it is that the members agree that an employee who leaves a member of the Association is not to be employed by another member for a period of twelve months. Now what is said is that that is an agreement which could not be enforced, because it is contrary to public policy, and that because it is contrary to public policy, it is in itself evidence of an unlawful conspiracy. I confess I cannot follow that. "Unlawful conspiracy" was defined by Willes J. in *Mulcahy* v. *The Queen* (1) in this way: "conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." That is to say, to be a conspiracy—that is an unlawful conspiracy, one which gives rise to either an indictment or a right of action—it must have an unlawful object, that is, the act which it is intended to bring about must be in itself unlawful, or, if not in itself unlawful, then it must be brought about by unlawful means. Neither of those two essentials is to be found in the agreement contained in this rule. The object which was to be brought about was that which it was lawful for any member of it to do, that is to say, to employ or not to employ a particular person. There were no means of enforcing it provided by the rule; there was no sanction, and the mere fact that if an action had been brought on this rule it could be held void as being in restraint of trade does not in itself, in my opinion, make it an unlawful rule in the sense of making those who are parties to it parties to an unlawful conspiracy. It has been decided over and over again that if I enter into a contract which is not enforceable, which is void as being in

(1) (1868) L. R. 3 H. L. 306, 317.

restraint of trade, I am committing no offence, I am merely promising to do that which I cannot be compelled to do, because it is, from the point of view of public interests, an undue restraint on my freedom of action. It is nothing more than that. The fact is that in the present case the rule is material only as affording a possible source from which undue pressure or undue influence might flow, but then the learned judge again, as I have pointed out, has found there was no undue pressure and no undue influence. That being so, I can only come to this conclusion, that the facts of the present case do not bring it within any of the principles which are stated in a large variety of forms in the very numerous cases which have been cited to us, and that the judgment of the learned judge in the defendant's favour is, therefore, correct, and the appeal must be dismissed.

YOUNGER L.J. I am of the same opinion. I arrive at that conclusion solely upon a consideration of the actual facts of this case. I can state my reasons, I think, very shortly. Hopkins' business at Neath was carried on in direct competition with that of Williams in that town where the plaintiff had been employed. There can, I think, be no question that if the plaintiff in his agreement with Williams had submitted to a restriction which would have precluded him from entering into or remaining in the service of Hopkins, that restriction would have been perfectly good. No principle of public policy would have been infringed by its having been entered into. It would have been a restriction which was not more than reasonably necessary for the protection of Williams' connection, and if it had been contained in an agreement which had been broken by Davies, an injunction at the instance of Williams would have been a matter of course.

A restrictive covenant in terms wider than those which I have suggested was originally contemplated as a covenant to be inserted in the agreement between the plaintiff and Williams, and that it did not find a place in that agreement was not due to any reluctance on the part of the plaintiff to have it inserted. It is noticeable, also, that in the agreement

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into which the plaintiff did enter with Hopkins, a restrictive covenant, not so far as I can see in any sense too wide, but wider than that which I have indicated, does in fact find a place. It is true, as I have said, that there is no such restrictive covenant in fact in the agreement that was concluded between the plaintiff and Williams, but I cannot, on any principle, see what objection can at the instance of the plaintiff be suggested to any arrangement that might be entered into between Hopkins and Williams that Hopkins should give effect to that perfectly fair provision. Again, if Hopkins were so to agree, there would be no principle of public policy involved, nor, so far as I can see, would any right of the plaintiff properly so called be infringed. There was something in the nature of an arrangement come to between Williams and certain other people, and Hopkins, the effect of which was that Hopkins did give notice to the plaintiff, determining in due course the agreement which he, the plaintiff, had entered into with Hopkins, and it is of that notice that the plaintiff complains in this action.

I have said that I myself can see no objection on principle to such an arrangement being entered into between Williams and Hopkins. Equally I can see no objection to other persons associating themselves in bringing about that arrangement if those persons were, as they were, persons connected with the industry in which both Williams and Hopkins were engaged, and in that character bringing before Hopkins such arguments as occurred to them to prompt him to take the course of giving notice to the plaintiff. It is, as I have said, of that notice the plaintiff complains, and it is in respect of the action of Mr. Williams and those other persons in relation to it that he seeks to recover damages. It is not a case in which these defendants by any unlawful means have induced Hopkins to give that notice, nor is it, on the finding of the learned judge, even a case where the defendants, by improper considerations, bribery or otherwise, have induced Hopkins to take that course. It is merely a case where the defendants acting as they conceived in their joint interests placed, as the learned judge has found,

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before Hopkins arguments and considerations which led him to give to the plaintiff a notice which so far as any contract with the plaintiff was concerned he had a perfect right to give.

In my judgment no illegal means were adopted to induce Hopkins to give that notice, nor was any illegal result achieved. Accordingly, on the facts of this case, I am of opinion that the plaintiff has shown no cause of action against the defendants, and I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellant: *Corbin, Greener & Cook.*
Solicitors for respondents: *Indermaur & Brown.*

G. A. S.

In re WAKLEY. WAKLEY *v.* VACHELL.

C. A. 1920 *Feb.* 4, 5, 6, 9, 23.

[1919. W. 591.]

Will—Bequest of Cumulative Preference Shares—Dividends declared after Testator's Death—Whether Apportionable in Respect of Period before Death—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 5.

A testator specifically bequeathed cumulative preference shares in a company to his son R. and settled his residuary estate upon trust for all his children. At his death in 1905 the dividends on the shares were in arrear, and it was not until 1907 that there were any profits available for dividend. In that year an interim dividend was declared sufficient in amount to satisfy all the arrears upon the preference shares:—

Held, that the dividend declared in 1907 must be treated as being in respect of that year only; that the Apportionment Act, 1870, did not apply; and consequently that the whole of the dividend belonged to R.

Statement of Buckley J. in *In re Taylor's Trusts* [1905] 1 Ch. 734, 738 followed by Astbury J. in *In re Sale* [1913] 2 Ch. 697, and Eve J. in *In re Grundy* (1916) 117 L. T. 470 approved.

Decision of Peterson J. reversed.

APPEAL from a decision of Peterson J.

William John Wakley by his will dated October 16, 1903, after appointing his wife, Charlotte Alice Wakley, D. T. N. Wade

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and P. Miles executors and trustees thereof, and making various specific and pecuniary bequests, bequeathed all the shares held by him in a company called Morgan, Wakley & Co., Ld., to his trustees upon trust for sale and investment and to stand possessed of the investments in trust for his son Ronald to be absolutely vested in him on the testator's death, but not to be payable or transferable to him until he attained the age of twenty-two years. The will then provided that the trustees should immediately after the testator's death procure themselves to be registered as the holders of the shares and stand possessed of the said shares and postpone the sale thereof until his son should attain the age of twenty-two years, and upon that event happening should transfer the said shares to him provided he should be then actively engaged in the business of the company. The trustees were also empowered to transfer the shares to Ronald before he attained twenty-two on the same conditions, and to accumulate during his minority any income of the shares to be applied towards his maintenance or education or otherwise for his benefit during his minority, and to add the accumulations thereof to the capital. The testator then devised and bequeathed the residue of his real and personal estate to his trustees upon trust to sell and convert and invest the proceeds and to stand possessed of his residuary trust moneys upon trust after payment thereout of an annuity to his wife for his children in equal shares. The trustees were further empowered to apply in or towards the maintenance, education, or benefit of each child entitled to a share in the residuary trust funds not absolutely vested the whole or any part of the income and to accumulate the unapplied surplus in augmentation of the capital. The testator then settled his son Ronald's share of residue upon trust for Ronald for life with remainder to his children or issue, and in default of issue upon trust for the testator's other children in equal shares.

The testator died on November 7, 1905, leaving his widow and four children—namely, Ronald, Dorothy, Marjorie, and Denis.

Ronald attained the age of twenty-one in 1911, and thereupon became entitled to the absolute interest in the shares in Morgan, Wakley & Co., Ld., bequeathed to him by the will, which were accordingly transferred to him by the trustees. He died on April 9, 1918, having been married, but leaving no issue. By his will he appointed A. C. Vachell and R. Tomlinson his executors.

Questions having arisen as to the funds out of which the sums expended on the maintenance and education of Ronald during his minority ought to have been paid, the trustees of the testator's will on April 4, 1919, took out an originating summons for the determination by the Court of the question (inter alia) whether upon the true construction of the will and in the events which had happened the sums expended for the maintenance, education, or benefit of Ronald during his minority ought to have been paid out of (a) the income arising from the shares in Morgan, Wakley & Co., bequeathed by the will in trust for him; (b) the income arising from the share of the residuary estate settled upon trusts under which Ronald was entitled during his life; or (c) the income of either or both such funds at the discretion of the trustees in any other way, and if so in what proportions.

After the issue of the summons the accounts of the testator's estates were examined on behalf of Ronald's executors, and it then appeared that a sum paid as dividends on the shares in Morgan, Wakley & Co., Ld., in December, 1907, had been apportioned between the testator's estate and Ronald. Accordingly on October 19, 1919, Ronald's executors took out a summons asking for a declaration that the sum of 6210*l.* 6*s.*, representing the dividends paid upon the preferred and deferred ordinary shares in Morgan, Wakley & Co., Ld., in December, 1907, was wholly income of the share of Ronald, and that no part of the same ought to be treated as capital of the estate of the testator on the ground that the same was wholly earned after the death of the testator.

The facts with regard to these dividends were as follows:—

By clause 5 of the memorandum of association it was

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provided that: "The capital of the company is 75,000*l.* divided into 2000 preferred ordinary shares, and 5500 deferred ordinary shares of 10*l.* each. The profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute are, subject to the rights of the holders of any shares which may hereafter be created and issued, to be applicable first to the payment of a fixed cumulative dividend at the rate of 6 per cent. per annum on the capital paid up on the said preferred ordinary shares; secondly, to the payment of a fixed cumulative dividend at the rate of 12 per cent. per annum on the capital paid up on the said deferred ordinary shares; thirdly, of the surplus one-sixth shall be applicable to the payment of a further dividend on the said preferred ordinary shares rateably as aforesaid, and five-sixths shall be applicable to the payment of a further dividend on the said deferred ordinary shares rateably as aforesaid."

The material articles were the following:—

Article 119: "The directors may, with the sanction of the company in general meeting, from time to time declare a dividend to be paid to the members in accordance with their rights and interests in the profits and other moneys available for that purpose."

Article 120: "No dividend, instalment of dividend, or bonus shall be payable except out of the profits arising from the business of the company. No larger dividend shall be paid than shall be recommended by the directors."

Article 121: "The directors may, if they think fit, from time to time determine on, and declare an instalment to be paid to the members on account and in anticipation of the respective dividends for the current year."

Article 128: "No unpaid dividend, bonus, or interest, shall bear interest as against the company."

The company made a profit for the half-year ending December 31, 1904, of 1600*l.*, but no dividend was declared. In the next year, ending December 31, 1905 (the year in which the testator died), there was a loss of over 14,000*l.* In the year ending December 31, 1906, there was a profit of 16,617*l.*;

for the first half-year of 1907 there was a profit of over 20,000*l.*, and apparently a still larger profit for the latter half of the year. The shares being cumulative preference shares, the result of the large profits was that there was paid in 1907 a dividend sufficient to cover not only the dividend for that year, but also the dividends which had not been paid in the two previous years.

On December 2, 1907, the directors resolved to declare, and forthwith pay, an interim dividend at the rate of 18 per cent. on the preferred, and 24 per cent. on the deferred shares, "which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906."

On February 4, 1908, it was resolved by the company in general meeting "to distribute a further dividend of 3 per cent. on the preferred ordinary, and 18 per cent. on the deferred ordinary shares, which would wipe off all arrears of the cumulative dividends on both classes of shares up to the 31st December, 1907."

The payment of the interim dividend was accompanied by a letter of the secretary to the company dated December 3, 1907, in the following terms: "I have much pleasure to inform you that your directors have decided to distribute an interim dividend at the rate of 18 per cent. on the preferred ordinary shares (being 6 per cent. per annum for three years ending June, 1907), and 24 per cent. on the deferred ordinary shares (being 12 per cent. per annum for two years ending June, 1906), and I now beg to enclose cheque for the interim dividend due on your holdings," and then followed particulars of the cheque.

The two summonses were heard together by Peterson J. on November 12 and 13, 1919. In answer to the question asked by the originating summons, his Lordship declared that the sums expended in the maintenance, education, and benefit of Ronald during his minority ought to have been paid out of the income arising from the shares in Morgan, Wakley & Co., Ld., except as to the first two years after the death of the testator, when such sums were in fact paid out

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of his share of the residuary estate, and that such payment ought to be treated as an exercise of the trustees' discretion.

In answer to the second summons his Lordship held that the Apportionment Act, 1870, applied, and that the sum therein mentioned ought to be apportioned between the respective estates of the testator and Ronald.

Ronald's executors appealed from the decision on both points. The appeal came on for hearing on February 4, 1920.

The question raised by the first summons depended on the construction of the provisions of the particular will, and does not call for a report, and the arguments and the parts of the judgments of the Court of Appeal dealing with it are therefore omitted. The present report is accordingly confined to the question as to the dividends raised by the second summons.

Hughes K.C. and *F. Whinney* for the appellants. The whole of the dividend belongs to the appellants as the executors of Roland, the specific legatee of the shares. The dividend was, it is submitted, a dividend of 18 per cent. for the year 1907, when it was declared, and not a dividend of 6 per cent. for each of the years 1905, 1906, and 1907. Where there is a provision for a cumulative preference dividend it does not mean that a preference shareholder is entitled to a dividend of the specified amount for every year. Of course if no profits are earned in a given year there can be no dividend, but when profits are available for dividend then the preference shareholder is entitled to say that the ordinary shareholder shall take nothing until the preference shareholder has received his average dividend for all the years during which the preference shares have been in existence. That is the extent of his rights. But when the dividend on the preference shares is declared it must go to the persons who at the time hold the shares. A dividend can only be declared for the year during which profits are available. It is not a question of wiping out arrears. Until profits are earned there are no arrears.

The mode in which the resolution declaring the dividend states it is to be applied cannot affect the question. The

division between the preference and ordinary shareholders is determined by the memorandum and articles of association. See articles 119–121.

The testator's estate is not entitled under the Apportionment Act, 1870, to any portion of the dividend declared in 1907. The principle of *In re Taylor's Trusts* (1) applies a fortiori to the present case. Under the instrument in that case Buckley J. held that there was no interest payable at all as income of a year in which there was no fund available for its payment. That case was followed in *In re Sale.* (2) *In re Armitage* (3), which was also there followed, is not so much in point.

It cannot be right to say that a dividend is declared in respect of a year in which there were no profits or even a loss. If our contention is wrong then a specific legatee of preference shares might be bound, years after the receipt of his legacy, to account for an apportioned part of a sum representing arrears of dividends.

Here there has been no declaration of dividend in respect of any year other than the current year. "Dividends," as defined in the Apportionment Act, must be used with reference to current dividends.

Romer K.C. and *H. S. Preston* for the respondents. The Apportionment Act, 1870, applies. The effect of clause 5 of the memorandum of association is to give the preference shareholder a cumulative dividend of 6 per cent., so that if there are no profits of one year the arrears of dividend are to be carried forward and paid out of the profits of subsequent years: *Staples* v. *Eastman Photographic Materials Co.* (4) The testator was therefore entitled to 6 per cent. for 1906, and 1907 contingently on their being profits subsequently earned. The meaning of the expression "preference share holder" is discussed by Lord Cranworth in *Henry* v. *Great Northern Ry. Co.* (5)

[WARRINGTON L.J. referred to the statement in the judgment

(1) [1905] 1 Ch. 734.
(2) [1913] 2 Ch. 697.
(3) [1893] 3 Ch. 337.
(4) [1896] 2 Ch. 303, 305.
(5) (1857) 1 De G. & J. 606, 636.

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of Kay J. in *Eastman's Case* (1) as to the effect of *Henry's Case*. (2)]

The question in *Henry's Case* (2) was whether the dividend was preferential or not. No doubt the use of the word "interest" is of very great importance when you are considering whether a dividend is cumulative or not. *Bishop* v. *Smyrna and Cassaba Ry. Co.* (3) is an illustration of what Lord Cranworth said was the position of a preference shareholder, and is an instance in which effect was given to the inchoate charge of preference shareholders on profits.

[YOUNGER L.J. referred to *In re Crichton's Oil Co.* (4)]

A preference dividend is in the nature of interest charged on profits. The position of a cumulative preference shareholder is the same as that of a bondholder. The right to dividend is a right accruing de die in diem. In administering a trust fund between tenant for life and remainderman there are two established principles. The first is, if the stock is sold cum dividend between two dividend days, no profits having been declared available for dividend, the tenant for life is not entitled to claim in respect of lost dividend. That is a rule of convenience, and was established by *Bulkeley* v. *Stephens*. (5) The other principle is that if the trustee sells property belonging to the estate he must divide the proceeds between the tenant for life and the remainderman in proportion to their respective interests. That principle is illustrated by *In re Atkinson* (6), where a mortgage security on which settled funds were invested was realized by the trustee and proved to be insufficient for the payment of principal and interest in full, and it was held that the sum realized by the security ought to be apportioned between the tenant for life and remainderman in the proportion which the amount due for arrears of interest bore to the amount due in respect of the capital debt.

In re Taylor's Trusts (7) had nothing to do with the

(1) [1896] 2 Ch. 303, 309.
(2) 1 De G. & J. 606.
(3) [1895] 2 Ch. 265.
(4) [1902] 2 Ch. 86.
(5) [1896] 2 Ch. 241.
(6) [1904] 2 Ch. 160, 166.
(7) [1905] 1 Ch. 734.

Apportionment Act, 1870. The dictum of Buckley J. in that case was not necessary for its decision, and was, it is submitted, wrong. The decision throws no light on what would be the case where a dividend is earned and afterwards declared. That case was followed by Astbury J. in *In re Sale.* (1) In that case Astbury J. did not say what his decision would have been if the dividend had been declared.

In *In re Grundy* (2) the dividend had been declared, and Eve J., thinking that the case was covered by *In re Sale* (3), decided the very point which the Court is now asked to decide. That case is no doubt directly against our contention; but it is submitted that it was wrongly decided. Eve J. there held that the tenant for life was not entitled to any part of the dividends. It is submitted that the judge misunderstood *In re Armitage* (4), to which he was there referred.

[LORD STERNDALE M.R. It all comes back to the question whether the last part of the judgment of Buckley J. in *In re Taylor's Trusts* (5) was right.]

The Court cannot look at the declaration of dividend alone; it must also have regard to the memorandum and articles of the company. The directors can only declare an interim dividend for the particular year in which it is earned. The resolution of December 2, 1907, does not expressly state for what period the dividend is declared.

[LORD STERNDALE M.R. Must we not take it as having been declared according to their powers?]

[YOUNGER L.J. Suppose the directors were to declare in 1920 a dividend which was to be deemed to have been earned in 1900, would not the Apportionment Act apply?]

Yes. The Court can have regard to the dividend notice to see what the period is for which the dividend is declared.

[YOUNGER L.J. It is an interim dividend. The secretary's letter cannot affect the result of the directors' resolution.]

In the resolution of the company the words "wipe off all arrears" occur.

(1) [1913] 2 Ch. 697, 703.
(2) 117 L. T. 470.
(3) [1913] 2 Ch. 697.
(4) [1893] 3 Ch. 337.
(5) [1905] 1 Ch. 734, 738.

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Our submission is wider—namely, that a cumulative preference dividend, such as is provided for by clause 5 of the memorandum of association in this case, is in the nature of interest, which if not payable in one year is carried forward, and is a charge on the profits of subsequent years.

[They also referred to *In re Odessa Waterworks Co.* (1) and Buckley on Companies, 6th ed., p. 62.]

D. D. Reid for the trustees of the testator's will.

Whinney in reply. The Apportionment Act, 1870, did not really come in question in *In re Taylor's Trusts.* (2) The principle of that case is applicable to the present. Buckley J. there said that you could not throw back income if it was contingent. The directors could not by saying so alter the nature of the dividends.

[YOUNGER L.J. Article 125 shows that the persons who are entitled to the dividends are the shareholders on the register at the time of the declaration of the dividend.]

The directors acted exactly within their powers, and in accordance with the rights of the shareholders.

It is submitted that the Apportionment Act, 1870, does not apply to the present case, but that, if it does, it has not the extended operation which Peterson J. thought it had.

Cur. adv. vult.

Feb. 23. The following judgments were delivered.

LORD STERNDALE M.R. This appeal from Peterson J. raises two questions: one concerned only with the construction of the particular will under consideration, the other a question of general importance. I propose to deal with the question of construction first. [His Lordship dealt with the question of maintenance raised by the originating summons, and held (the Lords Justices concurring) that the construction placed upon the two maintenance clauses in the will by Peterson J. was correct, and that the appeal on that point failed, and should be dismissed. He continued:] The other question is one of

(1) (1897) [1901] 2 Ch. 190n. (2) [1905] 1 Ch. 734.

general importance, and it is whether the Apportionment Act, 1870, applies to certain dividends paid upon shares held by the testator—that is, whether his estate is entitled as against the persons interested under his will to a portion of those dividends as having accrued before his death. The facts are as follows. [His Lordship referred to the profits and losses made by the company in the years 1904, 1905, 1906, and 1907, and to the dividend paid in the last of those years, and continued :] If this dividend was paid in respect of each year the testator's estate is entitled to a sum representing the amount accrued in the year 1905 up to the time of his death, but if it was paid only in respect of the year 1907, although sufficient in amount to cover the unpaid dividends of the previous years, then the testator's estate is not entitled to any part of it. In order to decide this question it is necessary to consider the terms of the Apportionment Act, 1870, and also the provisions of the memorandum and articles of association of the company in order to ascertain the rights of the shareholders and the powers of the directors as to dividends. [His Lordship read clause 5 of the memorandum and articles 119, 120, 121, and 126, observing with regard to article 126 that he thought it referred only to dividends which had been declared and so become payable. He continued :] The sections of the Apportionment Act which relate to this matter are ss. 2 and 5. Sect. 2 provides : " All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Sect. 5 provides : " The word ' dividends ' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise ; and all such divisible revenue shall, for the purposes of this

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Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made." I agree with Peterson J. that under these sections the important matter to be considered is not the period in which the divisible revenue may be earned, but the period in or for which the payment of such divisible revenue shall be declared or expressed to be made. It is however admitted that such declaration must be made in accordance with the powers conferred upon the directors, and that a declaration that the dividend was paid in respect of a period by which in law it could not be paid would be of no effect.

It is necessary therefore to see what is the effect of the provisions as to cumulative dividends. The two views maintained before us may, I think, be stated thus: The respondents' view is that the shareholders acquire a right in each year to a 6 per cent. or 12 per cent. dividend, but that it can be paid only when profits are earned and a dividend declared, and that when the dividend is declared it is declared and paid in respect of each year in which no dividend has been paid. The appellants, however, contend that no right to dividend is acquired at all until profits are made and a dividend declared, and that each dividend is declared in respect of the current year, the shareholder by virtue of the provision that dividends shall be cumulative then, and not till then, acquiring a right to have for that year not 6 per cent. or 12 per cent., but that sum with an addition of the amount of the dividends which they did not receive in the previous years. I think the latter is the correct view. The shareholders, in my opinion, acquire no right to any dividend until there are, in the language of clause 5 of the memorandum, "profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute." It was argued that they had an inchoate right which became absolute on the happening of the events mentioned. I am not sure that I understand clearly the nature of an inchoate right, but if there be a right which

must be qualified by an adjective I think it is more correctly described as a conditional right, for, in my opinion, it does not arise until the two conditions of the existence of profits and the determination to distribute come into existence. When these conditions are fulfilled the shareholders acquire the right to add to the dividend for the year the same amount for each year in which no dividend has been paid. If this be correct, the dividend which is paid is not in respect of each year but in respect of the year in which profits are declared for division, the amount being by virtue of the cumulative clause determined by the whole amount of dividends unpaid.

Reliance was however placed upon the terms of the declarations of dividend by the directors at their meeting on December 2, 1907, and by the company at its general meeting on February 4, 1908. The declaration of the directors was in these terms: "It was resolved to declare and forthwith pay an interim dividend at the rate of 18 per cent. on the preferred and 24 per cent. on the deferred shares, which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906." The declaration by the company was as follows: "The chairman intimated that it was proposed to distribute a further dividend of 3 per cent. on the preferred ordinary and 18 per cent. on the deferred ordinary shares, which would wipe off all arrears of the cumulative dividends on both classes of shares up to December 31, 1907, leaving a balance of undivided profit of 24,758*l.* 1*s.* 11*d.* to be carried forward to new accounts." It was argued that the effect of these declarations was that the dividends were declared in respect of each year in which there were unpaid dividends. I doubt very much if this is the correct interpretation of these declarations. They seem to me to be declarations of an interim dividend of 18 per cent. and 24 per cent., and a final dividend of 3 per cent. and 18 per cent. for the year, with an explanation that this amount is made up by taking into account the unpaid dividends of former years, and if so they are in accordance

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with what I think was the only declaration which the directors had power to make. As I have before pointed out, if they bear the meaning contended for by the respondents—that is, that the declaration was in respect of each year—I think they exceeded the powers of the directors, and if so they cannot alter the legal position of the shareholders. If the declaration be, as I think it is and must be, in respect of the year in which divisible profits exist, the Apportionment Act does not apply to the dividends so declared. I ought to notice the argument placed upon the word "arrears." It is a convenient expression, and is often used in cases of this description, but it cannot be taken as meaning arrears in the strict sense of the word, which I take to be sums of money in respect of which the date of payment has passed, for, as I have already pointed out, no dividends were due or payable in the earlier year, because the conditions essential to payment had not been performed. So far I have dealt with the matter apart from authority, but there is authority in favour of the view which I have expressed.

In *In re Taylor's Trusts* (1) Buckley J., dealing not with a question of dividends but of interest on a bond payable only out of net earnings of the company, which gave the bond with a proviso that any unpaid interest should be paid out of the net earnings of any subsequent year, used these words: "Suppose that in the year 1904 there was no fund available, and the tenant for life died on December 31, 1904. There was no income, I apprehend, payable to that tenant for life, because the obligation is to pay out of a fund, and there was no fund. If in the year 1905 a fund came into existence, the interest calculated for the year 1904 would be payable, I agree; but it would be income of the year 1905, and not income of the year 1904. And if a second tenant for life were in the enjoyment of the property in 1905, that tenant for life, and not the previous tenant for life, would, it seems to me, take that interest." It is true that in that case there was no question of the Apportionment Act, but the principle stated in that passage is equally applicable to cumulative

(1) [1905] 1 Ch. 734, 738.

dividends and to the cumulative interest in that case. This statement of the learned judge was said to be obiter, and not necessary for the decision of the case. It may be that he might have arrived at the same conclusion on grounds which would not require the application of the principle stated in the words I have cited, but I am inclined to think that his decision was really based on the principle there stated. This is, however, immaterial, for whether it be a dictum or a part of the judgment it is, though the statement of an eminent judge, not binding on us here. We have, therefore, especially in view of its application by Eve J. in a case to be mentioned later, to consider whether it is correct.

In *In re Sale* (1) Astbury J. adopted and followed this statement of Buckley J. I think that the case might have been decided by that learned judge without resort to that principle, but the concluding words of his judgment seem to me to show that he adopted it as correct. They are as follows: "The resolution creating the cumulative preference shares is in common form and the articles provide for the declaration of dividends in the usual way out of profits and for the creation of a reserve fund at the directors' discretion. . . . . The life tenant had no right to a fixed dividend charged on profits in any event. She had merely a right to a preferential dividend as and when the directors of the company chose to declare it, and no dividend for any part of the life tenancy period was in fact earned or declared." Then, after a passage which is immaterial to this case, his Lordship goes on: "On the true construction of the will the testatrix in my judgment intended that on the life tenant's death the shares and all dividends declared for periods subsequent to that date should belong to the remaindermen absolutely. The claim of the life tenant's executors therefore fails."

Finally, in *In re Grundy* (2), Eve J., following the decision of Astbury J., applied this principle to a case which is exactly similar to that now under our consideration, and it was conceded that in order to adopt the respondent's contention

(1) [1913] 2 Ch. 697, 703. (2) 117 L. T. 470.

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in this case we must overrule the decision in *In re Grundy*. (1) I think that we ought not to do so, and the statement of the law by Buckley J. in *In re Taylor's Trusts* (2) was correct.

I wish to mention, in order to show that I have not overlooked them, the expressions of other learned judges to which we were referred of "interest" and "arrears" as applying to cumulative dividends. The point under our consideration was not before those learned judges in those cases, and I do not think they had any intention of using the words "arrears" in the strict sense which I have already mentioned, or "interest" as meaning interest which became due and payable in the years in which the dividends were unpaid. These amounts clearly did not become due or payable in those years, for they were only payable out of divisible profits, and there were none.

I think on this second point the appeal should be allowed, and that there should be a declaration that the Apportionment Act does not apply to these payments of dividend.

As each party has succeeded on one point I think there should be no costs of this appeal.

WARRINGTON L.J. Two questions have to be decided: one of general interest, the other one of construction on the particular will.

The first question is whether a cumulative dividend of an amount large enough to cover unpaid dividends for two years and a half prior to that on which it was declared and paid is, for the purposes of the Apportionment Act, to be treated as accruing from day to day during the period of three years or only during the year in which it was declared.

The testator, who died on November 7, 1905, was possessed of preferred ordinary and deferred ordinary shares in a company carrying a cumulative dividend in the case of the preferred shares at the rate of 6 per cent. per annum, and in the case of the deferred ordinary shares at the rate of 12 per cent. per annum. By his will he bequeathed these

(1) 117 L. T. 470. (2) [1905] 1 Ch. 734.

shares to his son Ronald, who died on April 9, 1918. The appellants are his executors.

The memorandum of association contains the following provision. [His Lordship read clause 5 of the memorandum and also articles 119, 120, and 121, and continued :] Provision was made for an annual balance sheet and an annual audit.

In the first half of the year 1904 an interim or instalment dividend was paid on both classes of shares. In the second half of that year there was a small profit, but no dividend was declared ; in 1905 there was a loss ; in 1906 there was a profit, but little more than enough to make good the previous loss. No dividend was declared in either of these two years. In 1907 during both half-years there was a large profit. On December 2, 1907, the directors resolved to declare and forthwith pay an interim dividend at the rate of 18 per cent. on the preferred and 24 per cent. on the deferred shares, " which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906."

On February 4, 1908, it was resolved by the company in general meeting " to distribute a further dividend of 3 per cent. on the preferred ordinary and 18 per cent. on the deferred ordinary shares, which would wipe off all arrears of the cumulative dividends on both classes of shares up to the 31st December, 1907." The payment of the interim dividend was accompanied by a letter of the secretary of the company dated December 3, 1907, in the following terms. [His Lordship read the letter.] The executors of the testator claim that these dividends must be apportioned, and that they are entitled to the part apportioned to the period which elapsed from July 1, 1904, to November 7, 1905. Peterson J. has adopted this view, and the executors of the legatee appeal. The judgment of Peterson J. is founded on the terms of the Apportionment Act, 1870. The material parts of that Act are ss. 2 and 5. [His Lordship read the sections.]

The first question to be considered is what is the nature of a shareholder's right to a cumulative dividend. It is, in my opinion, nothing more than a right to participate in

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profits available for dividend which in accordance with its regulations the company has from time to time determined to distribute. In fact the shareholder has no right to a dividend, whether cumulative or otherwise, until there are profits available, and the company by the proper authority has determined to distribute them. It follows that when profits are available and the company determines to distribute them it is the shareholder who is then entitled to the shares who takes the dividend, and not the person entitled to them in past years, though the dividend may in the case of cumulative dividend be large enough to cover the amount which would have been paid in past years if there had been profits available, but which was not paid because there were no such profits. See *In re Taylor's Trusts* (1); *In re Sale* (2); and *In re Grundy.* (3) The articles, in my opinion, contemplate annual accounts, and the practice of the company was in accordance with that view. When, in 1907, after an interval of two years and a half, during which there were no profits applicable for dividends, a dividend was at last declared, it was, in my opinion, not three dividends but one dividend, although its amount was conditioned by the fact that in previous years no dividend had been paid. In my opinion, therefore, the interim dividend declared in December, 1907, and the final dividend declared in February, 1908, were both for or in respect of the year 1907.

Peterson J., however, while admitting the correctness of the decisions above referred to, thought that they did not govern the present case, in which the point to be decided is whether the Apportionment Act is to be applied. But, under s. 5 of the Act, if the payment of divisible revenue is declared or expressed to be made for a particular year, that is the period during which the divisible revenue is to be deemed to have accrued by equal daily increment; and the dividend, which is only a part of that divisible revenue, must be considered as accruing from day to day during the same period; for I think it is clear that the provision as to the

(1) [1905] 1 Ch. 734. (2) [1913] 2 Ch. 697.
(3) 117 L. T. 470.

accrual of divisible revenue is intended to fix the period during which dividends are to be considered as accruing for the purposes of s. 2.

As I have already indicated, I think the true view of the resolution of the directors as to the interim dividend and that of the company confirming the recommendation of the directors as to the final dividend is that the payment thereby declared or expressed to be made was for or in respect of the year 1907. The statement as to what the dividend would "cover" or "wipe off" is, in my opinion, nothing but an explanation of the rate per cent. at which the dividend was calculated. I think the same may be said of the secretary's letter; but if it goes further it cannot, in my opinion, alter the effect of the formal resolution. No dividend, therefore, having accrued at the death of the testator there is no ground for apportionment, and, in this respect, the order of Peterson J. must, in my opinion, be reversed.

YOUNGER L.J. The second question raised by the appeal is whether the dividends received upon the testator's shares in Morgan, Wakley & Co., Ld., belong to the estate of Ronald as the specific legatee of these shares, or whether to any extent they form, under the Apportionment Act, part of the testator's general estate.

The facts which raise the question are simple. For convenience they may be partly restated.

The testator was the holder in the company of 847 preferred shares, 1920 deferred shares, and of a moiety of 5 preferred shares. All these shares he bequeathed to Ronald, and in the event they became, with all dividends accruing thereon, from the date of his death Ronald's absolute property. The financial year of the company ends on December 31. The testator died on November 7, 1905.

Dividends upon the shares were paid up to June 30, 1904. In respect of the period from June 30, 1904, to December 31, 1904, a profit of 1616*l.* 1*s.* 4*d.* was made, but no dividend was paid. For the year 1905, the year of the testator's death, a loss of 14,565*l.* 3*s.* 2*d.* was made. In 1906 a profit

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of 16,617*l.* 12*s.* 3*d.* was made, but no dividend paid. In 1907, from January to June, a profit of 21,095*l.* 1*s.* 6*d.* was made, and in the same year, from July to December, the company earned a profit of 32,885*l.* 11*s.* The question arises with reference to a so-called interim dividend paid on December 31, 1907, as a result of these profits earned in the year 1907. I need not again read the directors' resolution for payment of the interim dividends nor the letter of the secretary transmitting them. These have already been set forth. The question is whether the interim dividends on both classes of shares, so resolved upon by the directors on December 2, 1907, and paid on December 3, were as to any part of them paid in any true sense in respect of the period from June 30, 1904, to November 7, 1905, the date of the testator's death, or whether they were paid in respect of the financial year of the company ending December 31, 1907, in the course of which they were in fact distributed.

If article 121 is alone to be regarded these dividends must be taken to have been "paid to the members on account, and in anticipation of the respective dividends for the current year." That is the only power which the article gives to the directors. But the question was in argument dealt with on more general grounds, and it is, I think, right so to deal with it.

Now in the case of this company the broad provisions as to preferred dividends are in a form very usual. Taking for convenience of statement the dividend rights of the preferred ordinary shares, the memorandum of association provides that "the profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative dividend at the rate of 6 per cent. per annum on the capital paid up" on these preferred ordinary shares. That dividend is payable only out of profits (article 120), and it is only payable if the directors, with the sanction of a general meeting, think fit to declare it (article 119), or if they determine on and declare an instalment by way of interim dividend (article 121). Other articles

of the company contain usual provisions for the making out of a balance sheet every year to be laid before the company in general meeting (article 132) for the examination thereof by the auditors (article 141) and for a report by them on the balance sheet to be read at every ordinary meeting (article 143). In other words, the articles contemplate annual distributions by the directors with the authority of the company given at the annual ordinary general meeting, and interim distributions in anticipation thereof made on the authority of the directors alone. But no shareholder in this company, preferred or otherwise, is entitled to any dividend unless there are profits existing and made available for its payment in one or other of the ways just mentioned, a preferred ordinary shareholder being however further entitled to this right, that if and so soon as profits are so made available for dividend they have first to be applied rateably in payment of the dividend on the preferred ordinary shares. This therefore is clear, that either if there are no profits or if there are none made available for payment of dividend as above no preferred ordinary dividend, cumulative though it be, can be truly said to be in arrear if, by that expression, it is connoted that the company has made default in payment of the dividend in question. There has not been any such default, because in the case supposed no obligation to pay has arisen. Putting it otherwise, there is in this essential particular no real analogy between the expressions "arrears of preference dividend" and "arrears of interest," although doubtless it is from this last expression that the first has for common parlance undoubtedly been borrowed.

But the preferred ordinary dividend is cumulative. How, then, is effect to be given to that right if, although not punctually paid, the dividend is still not "in arrear." Easily enough, I think, if the true nature of such a dividend is borne in mind. A cumulative preferred dividend is, in my opinion, correctly described as one which gives to the holder of the preferred share pari passu with all other holders of shares of the same class a right to receive out of a fund of profits made available for dividend under the articles of the company

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and in priority to the holders of all junior shares in it a sum measured by the percentage rate and the period of time over which the dividend has not been paid in whole or in part. The dividend when paid—not being in any true sense in arrear up to that moment—is paid out of the fund then made available for its payment for the year or other financial period of the company in which it is paid. It is not paid in respect of any previous period of non-payment—when it was neither due nor payable—it is paid exactly in the same way as is a dividend at the same time paid out of any residue of the dividend fund to holders of ordinary shares in respect of which there has been no distribution for a period as long or it may be even longer.

In other words, in respect of the time with reference to which dividends are paid, there is no difference between a cumulative preference and an ordinary dividend. Each is a dividend for the year or other financial period of payment: that the preferred dividend is preferential, fixed, and cumulative means only this, that these are the factors by which the priority and the amount of the share of the dividend fund appertaining to the preference shareholder are ascertained.

These general views are very clearly expressed in the regulations of this company. The fixed cumulative dividend here is by the memorandum one dividend and not many dividends—not a cumulation of separate dividends as Mr. Romer phrased it—and the surplus "sixth" in its nature an ordinary dividend is expressed to be a "further" dividend.

And for this view of the matter there is high authority. The principle was enunciated by Buckley J. in *In re Taylor's Trusts* (1), where, dealing with what is called an income bond, he used the words already cited by the Master of the Rolls. Peterson J. treats these words as obiter dicta, but in my view they lay at the root of the decision. Buckley J. there had to determine whether a tenant for life was entitled to any part of the purchase-money of certain settled income bonds sold for a sum representing less than

(1) [1905] 1 Ch. 734, 738.

the amount of principal secured with interest to date. The learned judge decided that the tenant for life was entitled to nothing out of the purchase price, only because he held that so long as there was no income fund of the company existing for its payment there was no interest due or "in arrear" on the bonds, and I believe the principle upon which he proceeded to be correct and to be directly applicable to such a case as the present. The only difference here is that in this instance the profits are only divisible if made available for dividend. In that case they were divisible if earned. In other words, the bond there was like the preference share in *Bishop* v. *Smyrna and Cassaba Ry. Co.* (1): here the shares are similar to those in *In re Crichton's Oil Co.* (2) Buckley J.'s decision has been followed and so applied by Astbury J. in *In re Sale* (3), and under circumstances identical with this case by Eve J. in *In re Grundy* (4), a case not cited to Peterson J.

Now that learned judge decided that the dividend here was apportionable not so much I think because he disagreed with any of the views here expressed, as because he felt himself constrained so to hold by the express terms of s. 5 of the Apportionment Act, 1870, which provides that: "all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made." Peterson J. was of opinion that in this case the payment of the interim dividend was in the directors' resolution expressed to be made in respect of a period prior to the testator's death; and although it is clear, as above appears, that no part of the divisible revenue had in fact been earned during that period he felt compelled to hold that the rights of the parties were under the statute fixed by that expression of the directors.

I take a different view, and for several reasons. First,

(1) [1895] 2 Ch. 265.
(2) [1901] 2 Ch. 184; [1902] 2 Ch. 86.
(3) [1913] 2 Ch. 697, 703.
(4) 117 L. T. 470.

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I do not so read the directors' resolution of December 2, 1907; nor do I so read the secretary's letter of the 3rd—although that letter can, in my judgment, have no effect upon the case. But further, in my opinion, the directors had no power under the articles here to make any such allocation if in fact they made it. Their power was, as I have already pointed out, "to declare an instalment to be paid to the members on account and in anticipation of the respective dividends for the current year," and Mr. Romer did not contend before us that under the Act a declaration or expression which it was not competent for directors to make could have any effect in determining rights.

Accordingly, being clear as I am that the interim dividend both on the preferred and the deferred ordinary shares was in fact only a dividend in anticipation of that for the year 1907, there is here, in my opinion, no case for apportionment. The dividends belong altogether to the testator's son, and the declaration of the learned judge should, I think, be altered in that sense.

Perhaps I ought to say a word with reference to one matter alluded to by Mr. Preston which may be thought to be affected by the present decision. He instanced in his argument the case of a class of cumulative preference shares, some issued and paid up, say, in the year 1915, others issued and paid up, say, in the year 1917; no dividends paid in 1915, 1916, 1917, or 1918, but profits earned in 1919 sufficient in amount for payment of a dividend on the shares issued in 1915 both for that year and for 1916, but no more; on that Mr. Preston contended that if the principle now adopted in this judgment were to be held applicable the holders of the 1915 shares would not receive the whole fund available for dividend, although in such circumstances it had always been assumed that they were so entitled, and many distributions had been made on that footing. I agree, but such distributions remain, in my judgment, perfectly right on the principle of this judgment. The shares supposed are all of the same class; some of them by reason of their earlier issue and payment up of capital have a larger claim on the dividend fund than others. It

is proper distribution as between the two sets of such shares to apply the first available dividend fund in producing equality amongst them all—that is by first extinguishing the excess. The principle here enunciated has in these distributions, although perhaps unconsciously, been in this respect in no way disregarded.

Younger L.J.

Appeal allowed.

Solicitors: *Lowless & Co., for Vachell & Co., Cardiff; Woodcock Ryland & Parker, for Wade & Son, Newport, Mon.*

W. I. C.

In re MORRIS' SETTLED ESTATES.

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[1919. M. 1969.]

Settled Land—Trustees—Power of Sale—Consent of Tenants for Life—Undivided Shares—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 6; *s.* 56, *sub-s.* 2—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 6, *sub-s.* 2.

Where land is settled in undivided shares by an instrument which gives the trustees a power of sale over the entirety, s. 6, sub-s. 2, of the Settled Land Act, 1884, renders it sufficient if the consent of the tenant for life of any one of such shares is obtained to the exercise of the trustees' power.

Testator by his will directed his trustees to hold his residuary real and personal estate upon trust for the children of his two marriages in equal shares, the income of the share of each son to be paid to him for life, subject to trusts to prevent alienation or incumbrance of income, the income of each daughter to be paid to her for life, independently of her husband and subject to similar trusts, and on the decease of each child upon trust for their children respectively as therein mentioned. In the event of the death of any child of the testator without issue his or her share was to accrue for the benefit of his surviving children. The will gave the trustees a discretionary power to sell the testator's real and leasehold property and to convey the same free from the trusts of the will. There were five children now living, who, and the widow of a son who had died, were each entitled to a life interest in one undivided ninth share of the trust estate. Four of them had signed a written consent to sales by the trustees, but the other two had declined

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to do so. The trustees had entered into a provisional contract for the sale of a leasehold house which formed part of the estate:—

Held, that the tenants for life of the undivided shares were persons entitled for "concurrent estates or interests" within the meaning of s. 2, sub-s. 6, of the Settled Land Act, 1882, and together constituted the tenant for life of those shares, and therefore, under s. 6, sub-s. 2, of the Settled Land Act, 1884, the consent of one only of those persons was necessary to the exercise by the trustees of their power of sale.

In re Osborne and Bright's [1902] 1 Ch. 335 overruled.

Quaere, whether in the circumstances of the case there was any tenant for life at all of the entirety of the settled land.

Decision of Eve J. [1920] W. N. 44 reversed.

APPEAL from a decision of Eve J. (1)

Frederick Morris by his will, dated May 1, 1860, after making certain pecuniary bequests devised and bequeathed his freehold and leasehold estates and the residue of his personal estate to his trustees upon trusts for collection conversion and investment of his personal estate and directed his trustees to stand possessed of his trust estate both real and personal and the income thereof, after payment thereout of all costs of management and outgoings and an annuity to his wife upon trust for the children of his two marriages in equal shares, the income of the share of each son to be paid to him for life, subject to trusts to prevent alienation or incumbrance of income, the income of each daughter to be paid to her independently of her husband and subject to similar trusts, and on the decease of each child upon trust for their children respectively as therein mentioned. In the event of the death of any child of the testator without issue his or her share was to accrue for the benefit of his surviving children. And the testator empowered each child of his by will or codicil to appoint to or in favour of his or her husband or wife provided such husband or wife should have been born in the testator's lifetime, the whole or any part of the annual income of his or her share for the life of such husband or wife or for any interest determinable on or before the death of such husband or wife. And he empowered his trustees if they should think the same expedient for the benefit of his trust

(1) [1920] W. N. 44.

estate at any time or times to sell all or any part of his real and leasehold estates to which he might be entitled at his decease in manner therein mentioned. And he directed that it should be lawful for his trustees to postpone such sale as aforesaid or not to sell as they might think most to the advantage of his trust estate.

The testator died on March 12, 1875, leaving eleven children surviving him.

There were five children now living, who, and the widow of a son who had died, were each entitled to a life interest in an undivided one-ninth share of the trust estate. Four of them had signed a written consent to sales by the trustees, but two others had declined to do so.

The trustees were desirous of selling a leasehold house which formed part of the testator's estate and had entered into a provisional contract of sale. Such sale was necessary for purposes of administering the estate.

Having regard to the decision of Kekewich J. in *In re Osborne and Bright's* (1) the trustees took out an originating summons for the determination by the Court of the question whether under s. 56 of the Settled Land Act, 1882 (2), and s. 6 of the Settled Land Act, 1884 (2), the consent of all

(1) [1902] 1 Ch. 335.

(2) Settled Land Act, 1882, s. 2, sub-s. 1: "Any deed, will . . . . under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement. . . . . "

Sub-s. 6: "If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of this Act."

Sect. 56, sub-s. 1: "Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative."

Sub-s. 2: "But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of

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or any of the persons now beneficially entitled as tenants in common during their respective lives or until alienation or incumbrance to shares of or in the rents and profits or income of the land settled under or by virtue of the will of the testator was necessary to the exercise by the trustees of the power of sale thereby given to them.

The summons was heard before Eve J. on January 22, 1920.

His Lordship said that the question asked by the summons was answered by the decision of Kekewich J. in *In re Osborne and Bright's*. (1) That decision was however open to criticism in that the persons entitled to the various shares of the settled estate did concurrently constitute the tenant for life and came within s. 6, sub-s. 2, of the Settled Land Act, 1884; but he felt a difficulty in departing from a precedent of a case decided in 1902 which had not been adversely considered. Accordingly without expressing the grounds which might have led him to a contrary conclusion, he answered the question in the summons by declaring that the consent of all persons now beneficially entitled during their respective lives or until alienation or incumbrance to shares in the rents and profits of the settled lands was necessary to the exercise of the power of sale given by testator's will to his trustees.

The consenting tenants for life appealed. The appeal was heard on May 7, 10, 1920.

H. F. F. Greenland for the appellants. Eve J. felt himself bound by the decision of Kekewich J. in *In re Osborne and Bright's* (1) to answer the question raised by the summons

any power conferred by the settlement exercisable for any purpose provided for in this Act."

Settled Land Act, 1884, s. 6, sub-s. 2: "In the case of every other settlement, not within the meaning of s. 63 of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section 2 of section 56 of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act."

(1) [1902] 1 Ch. 335.

as he did, contrary to his own opinion. The point arises solely under the Settled Land Acts. Before the Act of 1882 the trustees could have sold without any consent. From 1883 to July, 1884, the consent of all the tenant sfor life was necessary: s. 56, sub-ss. 1 and 2 of the Act of 1882. But what was considered to be a blot on the Act of 1882 was corrected by s. 6, sub-s. 2, of the Act of 1884, which provides that where two or more persons together constitute the tenant for life for the purposes of the Act of 1882 the consent of one only of them is sufficient.

[YOUNGER L.J. If the decision of Kekewich J. is right to what case can s. 6 of the Act of 1884 apply ?]

The object of the section was to prevent the tenant for life of one share from holding up a sale altogether. Kekewich J. thought that the settlement must be a settlement of the entirety.

[YOUNGER L.J. If *In re Osborne and Bright's* (1) be reversed it will not have the effect of disturbing any titles ?]

It is submitted not. The question is not discussed in any of the text-books.

[LORD STERNDALE M.R. referred to Hood and Challis on the Conveyancing, Settled Land and Trustee Acts, 7th ed., p. 344.]

The difficulty does not often arise.

[He also referred to *Smith* v. *Lancaster*. (2)]

A. J. Spencer for the trustees.

J. F. Carr for one of the dissenting tenants for life. It may be that s. 6, sub-s. 2, of the Act of 1884 has only a limited effect under the decision of Kekewich J., but it still applies to cases where the tenants for life are collectively tenant for life of the whole, and not each of an aliquot share.

[WARRINGTON L.J. Here there are no tenants for life of the entirety which is what the trustees propose to sell.]

The text-books have referred to *In re Osborne and Bright's* (1) without adverse comment: see Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., pp. 370, 458, 459, 484; Lewin on Trusts, 12th ed., pp. 774, 775; Williams on Vendor and Purchaser, 2nd ed., vol. i., p. 286; Hood and

(1) [1902] 1 Ch. 335. (2) [1894] 3 Ch. 439.

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Challis on the Conveyancing, Settled Land and Trustee Acts, 7th ed., pp. 217, 320, 344.

The decision complies literally with s. 2, sub-s. 6, of the Act of 1882 and s. 6, sub-s. 2, of the Act of 1884.

It is almost a necessary corollary to *Cooper* v. *Belsey* (1), in which it was held that a tenant for life of one moiety could sell his moiety without the concurrence of the person having rights of disposition over the other moiety.

[WARRINGTON L.J. The power of the trustees is altogether independent of the Settled Land Acts. I suggest that there is here really no conflict such as is referred to in s. 56 of the Act of 1882.]

Where you find aliquot shares settled there is in fact a settlement of the whole.

[WARRINGTON L.J. There is no conflict. The trustees would be selling the whole and each tenant for life only his aliquot share.]

[YOUNGER L.J. If you have no tenant for life then you require no consent.]

It is conceivable there may be a conflict between the tenants for life of the aliquot shares. Suppose there is an appointment of separate trustees of each aliquot share under s. 10, sub-s. 2 (*b*), of the Trustee Act, 1893 (56 & 57 Vict. c. 53), each aliquot share would be the subject of a separate settlement, and the consent of each tenant for life would be necessary to the exercise of the power of sale by all the trustees collectively. In *In re Sawyer and Baring's Contract* (2) it was held that on a sale by trustees the purchasers were entitled to a covenant for title both from the equitable tenant for life and from the trustees, and it follows that, if the consent of the tenant for life of one aliquot share is sufficient, the purchaser would have no covenant for title in respect of the other aliquot shares. Sect. 56 of the Act of 1882 and s. 6 of the Act of 1884 are not only for the protection of purchasers but also for that of the tenant for life. The effect of the Settled Land Act, 1882, was to put the tenant for life in the same position as the

(1) [1899] 1 Ch. 639. (2) [1884] W. N. 192.

trustees were as regards the power of sale. The trustees have a concurrent power over the whole, and where the aliquot shares of the property are separately settled the power of the trustees must be regarded as a collection of powers extending over all the aliquot shares in respect of each of which there may be a separate tenant for life. The will must be interpreted with reference to the position which has arisen by reason of the Settled Land Act, 1882, having been passed subsequently to the date of the will.

[YOUNGER L.J. The tenants for life have either concurrent interests or nothing.]

It is submitted that the consent of the tenant for life of each separate aliquot share is necessary to the exercise by the trustees of the power of sale. The decision of Kekewich J. in *In re Osborne and Bright's* (1) was right and should be followed.

H. F. F. Greenland in reply. Where the consent of the tenant for life is required under s. 56 of the Act of 1882, the purchaser is not entitled to insist on his concurring in the conveyance: *In re Pope's Contract.* (2)

It is submitted that it is clear under s. 6 of the Act of 1884 that the consent of one only of these tenants for life is sufficient.

LORD STERNDALE M.R. We think that the decision of Eve J. should be reversed in accordance with his own opinion, as he would have decided but for the decision of Kekewich J. in *In re Osborne and Bright's.* (1)

The question arises in this way. [His Lordship read the trusts of the will in favour of the testator's children and the power of sale and continued:] There were eleven children; two died without children, and their shares have accrued to the others; four have died leaving children, and their shares have become absolutely vested; four are alive, and one has died having appointed his share to his wife for life. The trustees are anxious to sell part of the property and they have obtained the consents of all the tenants for life, except

(1) [1902] 1 Ch. 335. (2) [1911] 2 Ch. 442.

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two. They wish to know whether the consents of all the tenants for life are necessary, or whether the consents which they have obtained are sufficient, or, indeed, whether the consent of one will be sufficient.

That turns upon the provisions of the Settled Land Acts of 1882 and 1884. Sect. 2 of the Settled Land Act, 1882, speaks in sub-s. 1 of estates and interests "for the time being limited to or in trust for any persons by way of succession."

Sub-s. 6 provides that: "If, in any case, there are two or more persons so entitled"—that is to say, beneficially entitled in possession of settled land for life—"as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of this Act." Sect. 56 provides: [His Lordship read sub-ss. 1 and 2 of the section and continued:] Under the Act of 1882 there is nothing that deals with the question of consent where there are several tenants for life.

Sect. 6, sub-s. 2, of the Act of 1884, provides: [His Lordship read the sub-section and continued:] The question is whether in this case, there being persons entitled for life to certain undivided shares in this land, they are persons coming within sub-s. 6 of s. 2 of the Settled Land Act, 1882, as constituting the tenant for life because they are entitled as tenants in common, or as joint tenants, "or for other concurrent estates or interests." In *In re Osborne and Bright's* (1) Kekewich J. held that they did not so constitute the tenant for life. He said: "It seems to me that Mrs. Vero"—who was a tenant for life of one of the undivided shares—"is not one of the several persons who together constitute a tenant for life. She is simply tenant for life of one undivided fifth. She is not tenant for life of the entirety, nor is she one of several persons who are together tenant for life of the entirety. There is no person who is tenant in common with her of the undivided fifth. And the same is true of any other person in a similar position with respect to any other undivided share. Accordingly, I think that I ought to make an order declaring that the power

(1) [1902] 1 Ch. 335, 341.

of sale given by the will is not exercisable without the consents of the persons beneficially interested under the will who are tenants for life, or entitled to exercise the powers of a tenant for life, under the Settled Land Acts." Eve J. felt himself bound by that judgment, but he said this: that he thought it was open to criticism in that the persons entitled in various shares in this estate did concurrently constitute the tenant for life and come within s. 6, sub-s. 2, of the Settled Land Act, 1884.

The limitations in this will are very common limitations indeed, and I cannot help thinking that the Legislature, in passing s. 2, sub-s. 6, of the Act of 1882, must have had in view cases of this description when it used the words "or for other concurrent estates or interests." The persons beneficially entitled under the limitations seem to me to be entitled for "concurrent estates or interests"; no doubt they are only entitled to undivided portions, but, still, they are entitled for concurrent estates or interests, as it seems to me, in the whole of the property, and, therefore, I think that they do come within that section and that the consent of one of them is sufficient. I, therefore, respectfully disagree with the decision of Kekewich J. and agree with the opinion expressed by Eve J. It seems to me that the only possible alternative would be to hold that there is no tenant for life of the entirety at all. If these persons are not to be considered as either tenants in common or persons entitled for concurrent estates or interests in the entirety, there is no person who has any concurrent estate or interest as tenant for life in the entirety, and in that case no consent would be required at all; but I prefer to rest my judgment upon the ground that they are persons entitled for concurrent estates or interests, and, therefore, the consent of one only of them is necessary.

WARRINGTON L.J. I am of the same opinion. Under the testator's will certain freehold and leasehold hereditaments are vested in trustees upon trust as to certain aliquot shares for persons for life with remainders over, and as to other aliquot shares for persons absolutely entitled. The trustees

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have a power of sale over the whole exercisable at their discretion, and, so far as the will is concerned, the consent of no person interested in the estate is necessary. They propose to exercise their power of sale. The tenant for life of one of the shares objects, and contends that having regard to the provisions of the Settled Land Acts, no sale can be made by the trustees without her consent. The order appealed from gives effect to that view, because it declares that the consent of all the tenants for life, in the case of aliquot shares settled on one for life with remainders over, is necessary for the due exercise by the trustees of their power of sale. Eve J. made the order in deference to a decision of Kekewich J. in *In re Osborne and Bright's* (1), expressing his own view that that decision was open to criticism but feeling himself bound by it. We are therefore virtually asked to overrule that decision. The facts in that case were for all material purposes exactly the same as those in the present case. Kekewich J. decided two points: first, that there was a conflict between the powers exercisable under the will and the powers exercisable under the Settled Land Acts; and secondly, having come to that conclusion, that there was no body of persons who together constituted a tenant for life within the meaning of s. 6, sub-s. 2, of the Act of 1884, and, therefore, that he was thrown back upon s. 56 of the original Act which required the consent of all the tenants for life. Now I think the real basis of his decision was this, that he regarded the power of sale of the trustees as a power split up into as many parts as there were aliquot shares under the trusts of the testator's will, that it was really a power exercisable over each of those aliquot shares, and, that if any one of those aliquot shares was settled, then inasmuch as the trustees were exercising a power over the land comprised in that particular settled share—namely, the undivided interest—the consent of the tenant for life of that interest was required, and that, if that was so, then the consent of the tenant for life of each of the undivided shares to a sale of the whole was required.

(1) [1902] 1 Ch. 335.

Now, I prefer to decide this case, as the Master of the Rolls has done, on the second of the two grounds on which Kekewich J. proceeded. I think in this case, taking the definition of " tenant for life " in s. 2, sub-s. 6, of the Act of 1882, " two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of this Act," that the several tenants for life of these several aliquot shares are entitled for concurrent estates or interests, and that as respects that fasciculus of undivided shares of which each settled share forms part, they together constitute the tenant for life ; and that if there is a conflict between the power of the trustees and the power of the tenant for life of that fasciculus of undivided shares then those tenants for life together constitute the tenant for life for the purposes of the Act, and the consent of one only of them would be necessary. Therefore, I am prepared on that ground to concur in the declaration which is asked for by the notice of appeal—namely, that the consent of one only of these tenants for life is required.

With regard to the other point, inasmuch as it is unnecessary to express any definite opinion upon it, I refrain from doing so, but I think it is a matter for serious consideration whether in such a case as the present there is any tenant for life at all of that over which the trustees have the power of sale—namely, the entirety. It is said that the exercise by the trustees of that power would conflict with the power of each tenant for life to sell his own undivided share. In a sense it would, but then I think the answer is that the testator has given to the trustees a power which puts an end to the division into aliquot shares altogether and which enables the trustees to sell the whole and to substitute for land held in equity, in common, money which is divisible amongst persons in the shares laid down by the testator. As I say I do not express any definite opinion upon the point, but I think it may well be said that the power which the trustees have exercised is a distinct power altogether from that which is given to each tenant for life, treating each aliquot share

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as the subject of a separate settlement. On the first point I am satisfied that if there is a conflict such as that which was held to exist by Kekewich J., then that conflict only extends to what I have called the fasciculus of shares as to which there are tenants for life, and so far as that is concerned those tenants for life are entitled for concurrent interests, at all events, and within the definition in sub-s. 6 of s. 2 of the Act of 1882 and under the provisions of s. 6 of the Act of 1884, the consent of one only of those persons is necessary.

YOUNGER L.J. I am of the same opinion.

Appeal allowed.

Solicitors for consenting tenants for life and trustees: *Le Brasseur & Oakley, for Fox, Whittucks, Pitt & Elwell, Bath.*

Solicitors for dissenting tenant for life: *Robin Hamp & Green.*

W. I. C.

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[1919. M. 95.]

Vendor and Purchaser—Conditions of Sale—Honest misrepresentation—Vacant possession—Right to rescind—Costs.

A statement made by a vendor on the faith of a promise or representation by a third party that he will concur in the sale, without having previously made an agreement with that third party binding him to do so, is not necessarily "reckless" within the meaning of the authorities on the point.

A vendor ought not to be held disentitled to exercise a clear and unambiguous power of rescission reserved to him in the contract because he has made an untrue statement of fact concerning the property agreed to be sold, if the statement was made under the bona fide belief and with some substantial ground for believing that it was true.

At a sale of lands by public auction in lots the particulars stated that the tenancy of lot 3 would expire at Michaelmas, 1919, when vacant possession might be had. The fifth condition of sale provided that if the purchaser should insist on any objection or requisition as to the

title, which the vendor should " be unable or on the ground of expense unwilling to remove or comply with," the vendor might by notice in writing at any time and notwithstanding any negotiations or pending litigation rescind the sale.

Lot 3 was held on a yearly tenancy determinable only by a year's notice on either side expiring at Michaelmas in any year. The result of interviews which the vendor had some months previously to the sale, with the executors of the deceased tenant and with their sub-tenant, was that the vendor, although no formal notice to quit was given on either side, had substantial grounds for believing that their tenancies would determine at Michaelmas, 1919. The plaintiff purchased lot 3 at the sale and then the question arose as to vacant possession being given of that lot, and eventually the executors declined to give up possession on the ground that no notice to quit had been given and their sub-tenant claimed to remain in possession until Michaelmas, 1921. On the plaintiff suing the vendor for specific performance with compensation the vendor gave notice to rescind the contract under the 5th condition of sale :—

Held, that under the circumstances the vendor was not guilty of such recklessness in stating the termination of the tenancy and the giving of vacant possession of lot 3 as disentitled him to exercise the power of rescission reserved to him by the 5th condition of sale, and consequently the notice to rescind was valid.

The principle of *Duddell* v. *Simpson* (1866) L. R. 2 Ch. 102 applied.

Nelthorpe v. *Holgate* (1844) 1 Coll. 203 and *In re Jackson and Haden's Contract* [1906] 1 Ch. 412 discussed and distinguished.

WITNESS ACTION.

In January, 1918, the defendant became the incumbent of the ecclesiastical benefice of Down Hatherley near Gloucester. At that date a farm of about 103 acres, forming part of the glebe lands of the benefice, was in the occupation of a Mr. Joshua Oakley on a yearly tenancy at a rent of 91*l*. This tenancy could only be determined by a year's notice on either side expiring at Michaelmas in any year.

In June, 1918, Mr. Joshua Oakley died. His executors were Mr. Roberts and Mr. Grimes, a solicitor. Some time before Michaelmas, 1918, Mr. Roberts had an interview with the defendant with a view to arranging what was to happen to Mr. Oakley's tenancy. At this interview Mr. Roberts asked the defendant whether he would accept Mr. Cock as a tenant in the place of Mr. Oakley. The defendant expressed his willingness to make an agreement with Mr. Cock but told Mr. Roberts that as he was thinking of selling the glebe lands he would not be able to guarantee Mr. Cock any tenancy which would last longer than a year. The

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defendant asked to whom it was suggested that he would have to look for the rent in future and Mr. Roberts told him it was Mr. Cock. The defendant then asked Mr. Roberts if the executors wanted to be released from the tenancy and Mr. Roberts replied in the affirmative. Shortly afterwards Mr. Roberts brought Mr. Cock to the rectory and introduced him to the defendant. At this interview Mr. Cock said that he realized that he was to have a tenancy for one year only but wished to know whether the defendant would take him on as a yearly tenant, to which the defendant replied that that would be a question of terms, whereupon Mr. Cock said that he would come back another time to discuss the matter. A few days later Mr. Cock came to the rectory and asked the defendant what terms he suggested for a yearly tenancy. The plaintiff asked for 2*l.* per acre but Mr. Cock declined to give more than 1*l.*, and no agreement was reached. Before Mr. Cock left the rectory the defendant said to him, "Very well, then your time is up Michaelmas, 1919," and Mr. Cock appeared to acquiesce in this statement. Mr. Cock went into occupation of the land comprised in Oakley's holding and paid the rent of 91*l.* direct to the defendant.

On September 6, 1919, the defendant, under the provisions of the Glebe Lands Act, 1888, caused part of the glebe lands to be put up for sale by public auction in three lots subject to printed particulars and conditions of sale. Lot 3 comprised the 103 acres of Oakley's holding. The particulars stated that lots 1 and 2 were sold subject to existing tenancies, and that lot 3 was "in the occupation of Mr. Cock as sub-tenant to the trustees of Mr. Joshua Oakley deceased, the tenancy expiring at the 29th September when vacant possession may be had." Condition 5 of sale provided that "if the purchaser shall insist on any objection or requisition as to the title, or evidence of title, or abstract, particulars, plans, conditions, conveyance, surrender or otherwise (not being a claim for compensation falling within condition 7) which the vendor shall be unable, or on the ground of expense unwilling to remove or comply with, the vendor may, by notice in writing to be given to the purchaser or his solicitor at any

time and notwithstanding any negotiation or pending litigation in respect of such objection or requisition, or any attempt to remove or comply with the same, rescind the contract, unless within 14 days after the delivery of such notice the purchaser shall, by notice in writing, withdraw such objection or requisition, and upon such rescission the deposit shall be returned to the purchaser, but without any interest, costs of investigating the title, or other compensation or payment whatever."

The 7th condition provided for compensation if any mistake or error should have been made "in the description of the property."

The date fixed for completion of the purchase was September 29, 1919, and the defendant never had any doubt in his own mind as to his ability to give vacant possession of lot 3 although no notice to quit had in fact been given on either side.

Mr. Cock attended the sale on September 6, 1919, and bid for lot 3, which however was eventually knocked down to the plaintiff at the price (including timber) of 3308*l.*, and the plaintiff paid a deposit. The sale took place on a Saturday afternoon. On the following Monday (September 8, 1919) Mr. Cock came to the plaintiff and offered to buy lot 3, but his offer was declined. At this interview Mr. Cock told the plaintiff that he wanted to stay on and said he was not bound to go out in view of the provisions of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, which had then recently come into operation. Thereupon the plaintiff's solicitors the same day wrote to the defendant's solicitors asking them to state exactly the position as to vacant possession being given on September 29 "as we hear that there is some question about it." The defendant's solicitors on September 11, 1919, wrote in reply as follows: "There is no question as to the land being void on the 29th inst. If Mr. Cock asserts to the contrary, he is wrong. Our client writes:—'The position is this. Some few months ago after the death of my tenant Mr. Joshua Oakley, his executors introduced Mr. Cock to me, and asked permission to sublet

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to him for the year ending September 29, 1919, after which time they gave me notice that their tenancy would cease. Mr. Cock then came to me and offered to make an agreement; he said if I would accept a pound per acre all round he would pay the same from that moment and from year to year. I said my price was 2*l.* per acre. To this he refused to listen and did not even offer to bargain. So I told him plainly: "Very well then, your tenancy expires next Michaelmas."' There does not appear to have been any written agreement with the late Mr. Oakley and certainly none with his executors or Mr. Cock." Relying on the statements contained in this letter the plaintiff, who was an auctioneer and estate agent, found sub-purchasers of three portions of lot 3 at enhanced prices. He also received two offers at an enhanced price for the remainder of lot 3 which he did not accept. These sub-sales and offers were made on the footing of vacant possession being given on September 29, 1919, and, if the three sub-sales had been completed and if the smaller of the two offers for the remainder had been accepted, the plaintiffs would have made a profit of 500*l.* on the transaction.

On October 2, 1919, the plaintiff visited lot 3 and found ploughing going on and cattle on the land. He thereupon interviewed Mr. Cock who told him that he was tenant for the next two years. On October 3, 1919, the plaintiff's solicitors wrote to the defendant's solicitors acquainting them with the attitude adopted by Mr. Cock and asking for an explanation. The defendant at once went to see Mr. Cock and then for the first time learnt from Mr. Cock that he claimed to be entitled to retain possession of lot 3 by virtue of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919. After some further correspondence the defendant's solicitors, on October 11, 1919, wrote to Mr. Cock making a formal demand upon him to give up possession of the property on October 15, threatening legal proceedings in default and pointing out that he was holding over under a misapprehension. Mr. Cock was apparently acting under the advice of Mr. Grimes when refusing to deliver up possession of lot 3, and eventually both Mr. Roberts and Mr. Grimes

denied that they had given the defendant notice to quit and Mr. Cock definitely refused to give up possession. Thereupon the defendant asked Mr. Bruton (the auctioneer who had conducted the sale) to ascertain whether Mr. Cock would accept any reasonable compensation for giving up possession, but Mr. Cock declined to come to any arrangement and insisted on remaining as tenant until at least Michaelmas, 1921.

On October 28, 1919, the plaintiff commenced this action claiming specific performance of the contract with compensation or, alternatively, damages for the defendant's breach of contract, and on December 9, 1919, the defendant served the plaintiff with a notice under the 5th condition of sale rescinding the contract.

Mr. Grimes died shortly before the trial of the action.

Owen Thompson K.C. and *H. B. Vaisey* for the plaintiff. The statement in the particulars as to the termination of the tenancy and the giving of vacant possession at Michaelmas, 1919, was a material misstatement which misled the plaintiff. Vacant possession was emphasized at the sale. The defendant was honest but he was absolutely careless and his conduct amounted to "recklessness" within the principle laid down by Collins M.R. in *In re Jackson and Haden's Contract* (1) and the cases there cited. The statement was not a mistake in the description of the property within the 7th condition of sale but falls within the 5th condition, and the Court will not under the circumstances allow the defendant to ride off under the power to rescind. The defendant's failure to complete is not a defect in title but is a refusal to give possession, and *Royal Bristol Permanent Building Society* v. *Bomash* (2) shows that in such a case the purchaser is entitled to some compensation in the nature of damages. Alternatively the purchaser is entitled to substantial damages for the defendant's breach of contract: *Engell* v. *Fitch* (3), *In re Daniel* (4); and the measure of damages is the difference

(1) [1906] 1 Ch. 412.
(2) (1887) 35 Ch. D. 390.
(3) (1869) L. R. 4 Q. B. 659.
(4) [1917] 2 Ch. 405, 409–10.

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between the contract price and the profit which the plaintiff would have made on his re-sales if the contract had been completed.

Jenkins K.C. and *J. R. Northcote* for the defendant. We do not admit that a mistake was made in the particulars and contend that the contract was duly rescinded under the 5th condition of sale, and therefore the action fails. If that is wrong it is on the evidence not a call for compensation and the plaintiff on obtaining judgment can take proceedings to eject Mr. Cock. The defendant is selling under the Glebe Lands Act, 1888, and is in the position of a tenant for life under the Settled Land Acts, and the purchase-money is paid to the Ecclesiastical Commissioners. The statement made in the particulars as to vacant possession was not reckless. It is Mr. Cock who has not acted fairly in the matter, but the defendant is not liable for that, and is not bound to bring an action against Mr. Cock to turn him out of possession. It is clear that the executors wanted to be relieved of the tenancy as soon as possible and so they bring Mr. Cock along, and it is submitted that what took place amounted to a surrender of their tenancy to the rector and the acceptance by him of Mr. Cock as tenant in their place for one year. No mala fides is imputed to the defendant and he was not bound to incur the risk of litigation with Mr. Cock. In *In re Jackson and Haden's Contract* (1) the vendor made a statement untrue to his knowledge, and the observations of Collins M.R. in his judgment are not supported by the authorities to which he refers. The present case is not unlike *Duddell* v. *Simpson* (2) where the vendor had reasonable grounds for the statement he made. Here the vendor was unwilling on the ground of expense to take proceedings against Mr. Cock, and has not acted capriciously or unreasonably in taking advantage of his right to rescind : *Hoy* v. *Smythies* (3); *Quinion* v. *Horne* (4) ; *In re Ramuz* (5) ; *In re Starr-Bowkett Building Society.* (6) The plaintiff must show that the rector

(1) [1906] 1 Ch. 412.
(2) L. R. 2 Ch. 102.
(3) (1856) 22 Beav. 510.
(4) [1906] 1 Ch. 596, 602–3.
(5) (1893) 37 Sol. J. 701.
(6) (1889) 42 Ch. D. 375, 379.

knew he could not give possession on September 29: *Nelthorpe* v. *Holgate*. (1) But if the plaintiff is entitled to specific performance with compensation for vacant possession, the measure of damages would be the value of the property at the date of the contract with vacant possession and its value at that date subject to a two years' tenancy. Secondly, this is a question of title and the plaintiff is not entitled to damages for the loss of his bargain: *Bain* v. *Fothergill* (2); C. Williams' Vendor and Purchaser, 2nd ed., p. 1065 et seq. *Engell* v. *Fitch* (3) is distinguishable. There the mortgagor in possession was a trespasser. Here the executors' tenancy had not come to an end and therefore the rector could not eject them. [They also referred to *White* v. *Cuddon* (4) and Farrer's Conditions of Sale, 2nd ed., p. 42.]

Owen Thompson K.C. in reply. Conditions of sale must be construed strictly against a vendor: *Greaves* v. *Wilson*. (5) This is not really a question of the vendor's title but a question of getting possession, and falls under the cases summarized in C. Williams' Vendor and Purchaser, 2nd ed., pp. 724–5. The defendant was not justified in being under the impression that he could give vacant possession when no notice to quit had been given. He was absolutely careless and was not entitled to rescind: Farrer's Conditions of Sale, 2nd ed., pp. 89–90.

Cur. adv. vult.

May 3. P. O. LAWRENCE J. stated the facts and continued: At the trial Mr. Owen Thompson pressed for specific performance with compensation and only asked for damages for loss of bargain in case the Court should hold that he was not entitled to the relief he primarily desired. The main defence relied upon by the defendant is that the agreement has been validly rescinded and that, consequently, the plaintiff is not entitled to specific performance or to any damages. The 5th condition of sale provides that if the purchaser shall

(1) 1 Coll. 203, 222.
(2) (1874) L. R. 7 H. L. 158.
(3) L. R. 4 Q. B. 659.
(4) (1842) 8 Cl. & F. 766, 790, 797.
(5) (1858) 25 Beav. 290.

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insist on any objection or requisition as to the title evidence of title or abstract particulars, plans, conditions, conveyances, surrender or otherwise (not being a claim for compensation falling within condition 7) which the vendor shall be unable or on the ground of expense unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser or his solicitor at any time and notwithstanding any negotiation or pending litigation in respect of such objection or requisition or any attempt to remove or comply with the same, rescind the contract unless within fourteen days after the delivery of such notice the purchaser shall by notice in writing withdraw such objection or requisition. The plaintiff does not seriously dispute that his objection is an objection as to the title or particulars within the meaning of condition 5, and is not a claim for compensation falling within condition 7. Further, he does not dispute that the notice of rescission has been given in good faith on the ground that the defendant is either unable or else on the ground of expense unwilling to remove the objection, and he admits that he has not withdrawn but on the contrary still insists upon his objection. He contends, however, that the defendant is not in the circumstances entitled to avail himself of the power of rescission conferred by condition 5 at all because the statement in the particulars with respect to the termination of the tenancy and the giving of vacant possession of the glebe lands was inserted therein by the defendant recklessly and without troubling to verify its accuracy and was calculated to mislead, and did in fact mislead the plaintiff. The plaintiff in support of his contention relies upon *In re Jackson and Haden's Contract* (1) in which Sir Richard Henn Collins M.R. states the result of the authorities bearing on this point. The broad effect of what the Master of the Rolls said on this subject is, I think, accurately summarized in Williams on Vendor and Purchaser, 2nd ed., p. 187, namely, that a vendor who has in the particulars knowingly or recklessly made an untrue statement of a material fact concerning the property sold is not entitled to rescind under such a condition as

(1) [1906] 1 Ch. 412.

condition 5 in the present case, so as to deprive the purchaser of his right to enforce specific performance of the contract with compensation. From the report of the case it does not appear clearly how far Romer and Cozens-Hardy L.JJ. concurred in the general remarks on the law made by the Master of the Rolls, but whether they did so concur or not I consider myself bound by the judgment of the Master of the Rolls and by his statement of the law. The question for decision on this head of defence therefore resolves itself into whether the statement in the particulars as to the termination of the tenancy and the giving of vacant possession of lot 3 was made recklessly within the meaning of the principle laid down or recognized by the Master of the Rolls in *Jackson and Haden's Case.* (1) It is not suggested that the defendant made the statement knowing it to be untrue. I think that the principle which I have mentioned must not be confused with the well-established principle that a vendor is not entitled to exercise a power which he reserves to himself to rescind the contract arbitrarily or capriciously. There are many decisions recognizing this latter principle, some of which (for instance, *Greaves* v. *Wilson* (2)) have been cited during the argument. In the present case it has not been suggested that there has been any arbitrary or capricious exercise of the power. The defendant has, in my judgment, made reasonable efforts to remove the plaintiff's objection, and has only given the notice to rescind after these efforts had failed. Moreover, the condition itself is framed so as to be as fair as possible between vendor and purchaser. The power can only be exercised if the vendor either is unable, or is on the ground of expense (but on no other ground) unwilling to remove the objection, and the purchaser is given a fortnight after the service of the notice of rescission within which to withdraw his objection. In the present case it has been proved to my satisfaction that the defendant was either altogether unable, or was unable without legal proceedings, to procure vacant possession to be given to the plaintiff until Michaelmas, 1921, and that the defendant was unwilling to incur the expense

(1) [1906] 1 Ch. 412. (2) 25 Beav. 290.

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of legal proceedings the result of which he could not foresee. The Master of the Rolls, in *Jackson and Haden's Case* (1) contrasts the case of *Duddell* v. *Simpson* (2) in which the vendor had made a misrepresentation, but had taken steps to assure himself that the representation was true, and was therefore held entitled to rescind, with the case of *Nelthorpe* v. *Holgate* (3) in which the vendor knew of the defect in his title, had taken no steps to assure himself that he could remove it, and had not satisfied the Court that he was under a mistaken belief that he could make a good title, and was therefore held not entitled to rescind. In *Jackson and Haden's Case* (1), the vendor, knowing that he was not entitled to the minerals under a piece of land in Staffordshire, put it up for sale by a description wide enough to include the minerals under it in the belief that no purchaser would be misled, as it was well known in the district that the minerals were reserved. On the purchaser taking the objection that the vendor had not shown any title to the minerals, and claiming specific performance with compensation, it was held by all the members of the Court that the vendor was not entitled to rely upon a condition giving him power to rescind on the ground that the objection taken by the purchaser was an objection falling within a condition as to compensation contained in the contract in that case, and by the Master of the Rolls (Sir R. Henn Collins) and Cozens-Hardy L.J. on the additional ground that the vendor had made the representation knowing that it was untrue, and recklessly, and that the case fell within the principle recognized in *Nelthorpe* v. *Holgate*. (3) The Master of the Rolls (after stating that a vendor, in order to disentitle himself to rely on the power to rescind, must have done less than an ordinarily prudent man, having regard to his relations with another person when dealing with him, is bound to do) considered that where a vendor, knowing the exact facts, had recklessly made a description of them which would mislead another person, there was a clear failure of duty on his part, namely, a reckless disregard of his duty

(1) [1906] 1 Ch. 412. (2) L. R. 2 Ch. 102.
(3) 1 Coll. 203.

as to the accuracy of statement when making a statement with a view to other people acting on it as correct, and held that the vendor in that case was not entitled to avail himself of the power to rescind, the purchaser's objection having arisen wholly and solely out of the recklessness in which the vendor had formulated the contract. (1)

The difficulty in the present case lies not so much in ascertaining the true principle as in applying the principle to the facts as proved before me. The defendant has a bad memory, and a somewhat lively imagination; moreover, in the witness-box he was unable to express himself clearly even when he desired and was anxious to state what, according to his recollection, had happened at the three crucial interviews in September, 1918. I have come to the conclusion however that he was an honest witness and that he did not say anything which he did not believe to be true. I doubt very much whether the defendant has remembered all that took place between himself and Mr. Roberts at the first interview, and I am convinced that he was unable to express clearly the true effect of what he did remember as having transpired at this interview. I have not much doubt that no formal notice to quit was given either by or to Mr. Roberts (as, indeed, the defendant admitted) but the defendant's evidence has convinced me that, whatever was said at that interview, the parties concerned were left under the impression that the annual tenancy then subsisting in favour of Mr. Joshua Oakley's executors would determine either immediately, if an agreement for an annual tenancy could be come to between the defendant and Mr. Cock, or at latest on September 29, 1919, if no such agreement could be come to, and that failing such an agreement being reached Mr. Cock would become the sub-tenant of the glebe lands for the remaining year of the late Mr. Oakley's tenancy, namely, up to September 29, 1919, and that the defendant would accept the rent for that year from Mr. Cock so long as it was duly paid. That this was the result of the interview was and still is the firm belief of the defendant, and the subsequent conduct both of

(1) [1906] 1 Ch. 421–2.

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the executors and of Mr. Cock tends strongly to support the view that it was also their belief—at all events their conduct in my opinion was more consistent with this view than with the attitude finally adopted by them. When Mr. Roberts introduced Mr. Cock to the defendant, Mr. Cock in the presence of Mr. Roberts told the defendant that he realized that he would have to give up possession at Michaelmas, 1919, and Mr. Roberts did not dissent from this statement. Further, Mr. Cock was told plainly by the defendant, after the failure to reach an agreement for an annual tenancy, that his tenancy would determine on September 29, 1919, a statement in which Mr. Cock seemed to acquiesce. Mr. Cock thereafter paid his rent to the defendant and not to the executors, who apparently were content with this arrangement although the result of the transaction was that they were not released from their obligation to pay the rent for the remaining year of the tenancy should Mr. Cock make default in payment of such rent. Neither the executors nor Mr. Cock seem to have made any protest when lot 3 was publicly advertised for sale with vacant possession to be given on September 29, 1919. The former must, I think, have had their attention called to these advertisements and to the particulars of sale and the latter actually attended the sale and bid for the property. Mr. Cock finding that the plaintiff outbid him at the sale appears to have consulted Mr. Grimes. As the result of such advice Mr. Cock seems to have claimed the benefit of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, which had received the Royal Assent on August 19, 1919. This claim appears to me to be wholly inconsistent with the claim made later on. It was not until after the defendant's advisers had pointed out that the provisions of that Act had no application to his case that the contention that no notice to quit had been given or received by the executors was first put forward. In the absence of any evidence by Mr. Roberts or by Mr. Cock it is impossible for me to express a final opinion as to whether the effect of the interviews in September, 1918, was or was not to determine Mr. Oakley's tenancy on September 29, 1919.

On the evidence of the defendant coupled with the attitude adopted by the executors and by Mr. Cock, however, I am of opinion that the defendant had substantial ground for coming to the conclusion, first, that the executors had agreed that their tenancy should determine on September 29, 1919; and, secondly, that the arrangement which the defendant had made with Mr. Roberts and with Mr. Cock in September, 1918, was made on the footing that the tenancy both of the executors and of Mr. Cock would determine at Michaelmas, 1919. I am of opinion that Mr. Cock was told both by Mr. Roberts and by the defendant (and fully appreciated at the time) that his tenancy was a tenancy which would only last up to September 29, 1919. The mistake he made in September, 1919, was that he considered himself as having received a notice to quit on September 29, 1919, which, if it had been the fact, might have brought him under the Act of 1919, whereas in truth his tenancy, if the defendant was right in his belief, was really one for a year only. That the defendant had arrived at the conclusion that the executors had agreed to determine the tenancy at Michaelmas, 1919, is fully borne out by the statement contained in the letter which he wrote to his solicitors (quoted in their letter of September 11, 1919) in which he states that the executors had given him notice that the tenancy would cease after September 29, 1919. This letter was written at a time when the defendant's recollection of what had taken place was somewhat fresher than it was when he was in the witness-box. That the defendant had substantial ground for arriving at his conclusion is in my opinion amply borne out by Mr. Cock's attitude at the sale. It is inconceivable that if Mr. Cock had then thought that his tenancy would not determine on September 29, 1919, he should have let the sale proceed on the footing that vacant possession would be given to a purchaser and that he should have actually competed with persons bidding on that footing. The case is near the line, but on the whole, having given my best consideration to all the evidence adduced before me, I have come to the conclusion that the defendant was not guilty of such recklessness in stating that the tenancy of

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lot 3 would determine on September 29, 1919, and that vacant possession could be had after that date as to disentitle him to rely on the power of rescission reserved to him under condition 5. Both in *Nelthorpe* v. *Holgate* (1) and *Jackson and Haden's Case* (2) the vendor had stated what he knew to be untrue, whereas in the present case the defendant stated what he believed to be (and what on a more complete investigation of the facts than is practicable in this case may possibly in fact be) true. In *Nelthorpe* v. *Holgate* (1) the vendor had no justification whatever for making the misrepresentation, and did not satisfy the Court that he had made the statement under the belief that he could make a title without the concurrence of his mother, or in consequence of any promise or representation on her part that she would concur in the sale, whereas in the present case the defendant has satisfied me that he made the statement in question in the bona fide belief that he could give vacant possession to the purchaser without the concurrence of either Mr. Cock or the executors, and in consequence not only of the representation which he believed and still believes was made to him by Mr. Roberts that the tenancy of the executors would come to an end on September 29, 1919, but also in consequence of Mr. Cock having stated to him in Mr. Roberts' presence that his tenancy would last up to that date only and having later acquiesced in the defendant's statement as to his view of the duration of the tenancy. It looks to me as if it were highly probable that the learned Vice-Chancellor in *Nelthorpe* v. *Holgate* (1) would have held that the vendor in that case could have availed himself of the power of rescission if it had been shown that he had honestly believed that he could have made a title without the concurrence of his mother or that she had made a representation to him that she would concur. In my view the facts of the present case approach more closely to the facts in *Duddell* v. *Simpson* (3) than to the facts in *Nelthorpe* v. *Holgate.* (1) It is true that in *Duddell* v. *Simpson* (3) the vendor had immediately before issuing the

(1) 1 Coll. 203. (2) [1906] 1 Ch. 412.
(3) L. R. 2 Ch. 102.

particulars communicated with the owners of the last three days of the term who had expressed their willingness to concur, whereas in the present case no communication was made to the executors and Mr. Cock immediately before the advertisements and particulars were issued. The reason, however, for the defendant not having again communicated with the executors and Mr. Cock is obvious—from first to last, the defendant never had any doubt in his own mind that the effect of the arrangement which he had made in September, 1918, was that the executors' and Mr. Cock's tenancy would come to an end on September 29, 1919. *Duddell* v. *Simpson* (1), moreover, shows that a statement made on the faith of a promise or representation by a third party that he will concur in the sale without having previously made an agreement with that third party binding him to concur in the sale is not necessarily "reckless" within the meaning of the authorities on this point. In my judgment the cases establish that a vendor ought not to be held disentitled to exercise a clear and unambiguous power of rescission reserved to him in the contract because he has made an untrue statement of fact concerning the property agreed to be sold in a case where the statement has been made under the bona fide belief that it is true and there exists some substantial ground for such belief. Such a case, in my judgment, differs materially from a case in which the vendor either knows that the statement is untrue (as in *Jackson and Haden's Case* (2)), or has no belief in the truth of the statement (as in *Nelthorpe* v. *Holgate* (3)), and differs also from the case where the vendor though believing the statement to be true has no ground, or only a fanciful and unsubstantial ground for such belief. In my judgment Sir Richard Henn Collins M.R. in *Jackson and Haden's Case* (2) did not lay down any new principle, and in speaking of the recklessness of the vendor used an expression intended to cover those cases in which a vendor had made an untrue statement without having any or at most only unsubstantial grounds for believing that it was true.

(1) L. R. 2 Ch. 102. (2) [1906] 1 Ch. 412.
(3) 1 Coll. 203.

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In the result I hold that the notice given by the defendant to rescind the agreement in this case was a valid notice and affords a good defence to the action. Having arrived at this conclusion it is unnecessary for me to say anything about the other points taken by the defendant in answer to the claim for specific performance with compensation, and to the alternative claim for damages for loss of bargain; to deal with those points would only be prolonging my judgment uselessly. I, therefore, content myself with dismissing the action on the ground that the agreement has been duly rescinded by the defendant.

As regards costs. The defendant, in his defence, pleaded the notice to rescind and offered to return the deposit and to pay the costs of the action down to the date of the delivery of the defence. Notwithstanding the non-acceptance by the plaintiff of this offer and his failure to succeed in the action, I have come to the conclusion that in the circumstances the plaintiff should not be ordered to pay any costs to the defendant. One of my reasons for exercising my discretion in this manner is that when two days after the sale, and before the plaintiff had attempted to deal with lot 3, he expressly asked to be informed of the exact position as to vacant possession being given to him on September 29, 1919, he was definitely informed by the defendant's solicitors that there was no question as to the land being vacant on September 29. No inquiry was made by the defendant or by his solicitors of the executors or of Mr. Cock before returning this answer. The plaintiff was encouraged by this answer to enter into arrangements for the re-sale of the property which I think I am justified in assuming he would not have done had he known the true facts and was thus practically compelled to fight the matter out. The action will be dismissed without costs.

Solicitors: *Morley, Shirreff & Co.; Field, Roscoe & Co.*

H. L. F.

IPSWICH PERMANENT MONEY CLUB, LIMITED *v.* ARTHY.

P. O. LAWRENCE J.

1920

April 27, 28; May 21.

[1919. I. 76.]

Settlement—Mortgages by Sole Trustee Reversioner—New Trustee—Knowledge —Notice—Priorities—Rule in Dearle v. *Hall* (1828) 3 *Russ.* 1.

Where a trustee before his appointment acquires knowledge of an incumbrance on the trust estate in such a way that as a reasonable man he would on his appointment act upon and regulate his conduct in the execution of the trust by the information so acquired, and that knowledge continues to operate on his mind in the same way after his appointment, notice given to him after his appointment by a subsequent incumbrancer will not displace the priority of the earlier incumbrance.

In 1903 A., the sole trustee of a trust estate, mortgaged his reversionary interest in the trust estate to B., and in 1907 he again mortgaged his reversionary interest to the plaintiffs without disclosing B.'s mortgage. A.'s reversionary interest was insufficient to pay both mortgages.

In July, 1908, the plaintiffs became aware of A.'s fraud, and negotiations then ensued and were still pending between them and H. (the brother of A.), when H., on September 23, 1908, procured himself to be appointed a new trustee of the trust estate in order to deal with the situation occasioned by A.'s fraud. On September 29, 1908, the plaintiffs again wrote to H. referring in effect to A.'s fraud and pressing for an answer. H. replied that he could do nothing, and on October 28, 1908, gave the plaintiffs and B. notice that on September 23, 1908, he had been appointed a new trustee of the trust estate. Thereupon the plaintiffs on October 30, 1908, gave H. formal notice in writing of their mortgage, and subsequently the transferee of B.'s mortgage gave H. formal notice of his security. After the reversionary interest had fallen into possession the plaintiffs claimed priority over B.'s mortgage on the ground that their notice to H. after his appointment as trustee was first in point of date, and relied on *In re Dallas* [1904] 2 Ch. 385 :—

Held, applying the principle of Lord Cairns' judgment in *Lloyd* v. *Banks* (1868) L. R. 3 Ch. 488, 490, that the knowledge of B.'s mortgage which H. acquired before his appointment as trustee and which continued to operate on his mind after his appointment was such that it protected the priority of B.'s mortgage and prevented the plaintiffs' notice from displacing that priority.

Held, also, that the direct effect of the plaintiffs' letter of September 29, 1908, was to remind H. again of B.'s mortgage and operated as a notice of that mortgage before he received the plaintiffs' notice, and consequently B.'s priority was not displaced.

In re Dallas [1904] 2 Ch. 385, and the Army agents cases there cited, explained and distinguished.

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WITNESS ACTION.

This was an action to determine which of two perfectly innocent parties was to suffer by the fraud of a third.

The following statement of facts is taken substantially from the judgment.

Benjamin Spendelow, by his will dated September 15, 1875, appointed his wife Jane Spendelow, his son William Spendelow, and William Barnard the executors thereof, and devised all his real estate to William Spendelow and William Barnard upon trusts for the benefit of his wife during her life, and after her death upon trust to sell the same and divide the proceeds amongst all his children in equal shares and so that the interest of his sons should be vested at the age of twenty-one and of his daughters at that age or marriage. The testator made a codicil dated March 10, 1890, to his will, and thereby revoked the appointment of William Barnard as an executor and appointed his sons George Ebenezer Spendelow and Harry Spendelow to be executors of his will together with his wife Jane Spendelow and his son William Spendelow. The testator died on July 11, 1896, and his will and codicil were proved by Jane Spendelow and William Spendelow on October 19, 1896, power being reserved to George Ebenezer Spendelow and Harry Spendelow to prove the same, which power was never exercised. Only four of the children of the testator attained vested interests under his will, of whom William Spendelow and Harry Spendelow were two. On April 28, 1896, William Barnard executed a deed poll whereby he disclaimed the real estate devised to him by the testator's will and renounced the office of trustee thereof. The testator at the date of his death was possessed of certain freehold property situate at Prittlewell, in the county of Essex, which he had mortgaged and further charged during his lifetime. On July 8, 1902, the mortgage and further charges created by the testator were transferred to and became vested in Ernest Meanley. On December 21, 1903, William Spendelow by an indenture of mortgage of that date conveyed all his part or share parts or shares of and in the reversionary residuary real estate of the testator to the defendant Arthy

his heirs and assigns by way of mortgage for securing the repayment of a sum of 200*l.* then owing by him to the defendant Arthy. This mortgage is hereafter referred to as "Arthy's mortgage." The defendant Arthy, who was a solicitor practising at Southend-on-Sea and had been acting for William Spendelow in relation to the testator's affairs, did not give a formal written notice to William Spendelow of this mortgage. On May 30, 1907, William Spendelow, acting through Mr. Thomas Cooper (another solicitor practising in Southend-on-Sea), obtained an advance of 200*l.* from the plaintiffs on the security of his interest under the testator's will, and by an indenture of mortgage of that date assigned the fourth share to which he was entitled under the testator's will expectant on the death of Jane Spendelow of and in the proceeds of sale of the real estate devised by that will to the plaintiffs by way of security for such advance. This mortgage is hereafter referred to as "the plaintiffs' mortgage." William Spendelow, when obtaining this advance, concealed Arthy's mortgage both from Mr. Thomas Cooper and from the plaintiffs and their solicitors, and neither the plaintiffs nor any one on their behalf had any knowledge or notice of Arthy's mortgage before the advance. On the day on which the plaintiffs' mortgage was executed the plaintiffs through their solicitors, Messrs. Turner, Turner and Martin, gave a formal notice in writing of this mortgage to Jane Spendelow, William Spendelow and Harry Spendelow. This notice had at its foot an acknowledgment in the following words: "We severally acknowledge receipt of the above-written notice and state that we have not previously had any notice of any dealings with the above-described reversionary interest of William Spendelow." This acknowledgment was signed by Jane Spendelow, William Spendelow and Harry Spendelow, and was then returned to the plaintiffs' solicitors. Harry Spendelow was not aware of Arthy's mortgage when he signed this acknowledgment. William Spendelow fell into arrear with his payments under the plaintiffs' mortgage, and the plaintiffs (after communicating with Harry Spendelow to see whether he would pay the arrears and thus save his

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brother's reversion from being sold) placed the reversionary interest of William Spendelow under the testator's will in the hands of Messrs. Talbot and White, auctioneers, for sale by public auction. The sale was advertised to take place at Southend-on-Sea on Saturday, July 18, 1908. Just before the time fixed for the sale the defendant Arthy saw the plaintiffs' solicitors and informed them of his mortgage, in consequence of which information the plaintiffs' solicitors instructed the auctioneers not to proceed with the sale. This was the first intimation which anyone on behalf of the plaintiffs had received of the existence of Arthy's mortgage. Harry Spendelow was informed that the defendant Arthy claimed to be first mortgagee of William Spendelow's interest under the testator's will by a letter which he received on July 20, 1908, from a friend who had attended the auction. This was the first intimation which Harry Spendelow had received that his brother William Spendelow had mortgaged his reversionary interest to anyone other than the plaintiffs. The news came to him as a shock. The plaintiffs' solicitors on July 20, 1908, wrote both to Harry Spendelow and to Mr. Thomas Cooper demanding an explanation. They also on the same day wrote to the defendant Arthy asking for the loan of his original security and adding: "Should we have to advise our clients as we anticipate doing that your security has priority to their security may we ask you whether you would be prepared to sell your security and if so what price you would say." The defendant Arthy on the same July 20, 1908, wrote to Harry Spendelow giving him formal notice of his mortgage of December 21, 1903. Negotiations thereupon ensued between the parties immediately concerned. The negotiations between the plaintiffs and the defendant Arthy lasted until the middle of December, 1908. The plaintiffs, after they had inspected and satisfied themselves of the genuineness of his mortgage, persuaded the defendant Arthy to postpone realizing his security pending an endeavour to come to some satisfactory arrangement with Harry Spendelow, which arrangement they hoped would result in their taking a transfer of Arthy's mortgage. The negotiations between

the plaintiffs and the defendant Arthy were conducted throughout on the footing that his mortgage had priority over the plaintiffs' mortgage, and the plaintiffs never suggested to the defendant Arthy until shortly before this action that their mortgage had gained priority. It was not until after the plaintiffs had failed to come to an arrangement with Harry Spendelow and had informed the defendant Arthy that they would not take a transfer of his mortgage that the defendant Arthy (after full notice to the plaintiffs) realized his security by transferring it to the defendant Turnnidge on January 11, 1909.

The negotiations between the plaintiffs and Harry Spendelow consisted of an endeavour to come to an arrangement having the twofold object of (1.) minimizing the loss which it was anticipated that the plaintiffs would suffer by reason of Arthy's mortgage ranking prior to their mortgage, and (2.) avoiding the publicity and scandal which would result if the plaintiffs were to take proceedings against William Spendelow. After some preliminary correspondence Harry Spendelow, on August 8, 1908, wrote a letter to the plaintiffs' solicitors making an offer that if the plaintiffs would agree not to proceed against William Spendelow he (Harry Spendelow) would propose to his mother, Jane Spendelow, that she and he would jointly guarantee to keep the interest on Arthy's mortgage paid up with the view to limiting that charge upon William Spendelow's share to 200*l.*, and thus enabling the plaintiffs to step in and claim the remainder of the share when the testator's estate was wound up. On August 12, 1908, the plaintiffs' solicitors wrote declining the proposal thus made by Harry Spendelow and making a counter-offer to the effect that the plaintiffs would take up Arthy's mortgage provided he (Harry Spendelow) and his mother, Jane Spendelow, would undertake to pay interest at 4 per cent. per annum on the whole 400*l.*, and his sister, Mrs. Green, would allow her reversionary interest (which was also in mortgage to the plaintiffs) to stand as security both for her own advance and for the advance to William Spendelow. On August 13, 1908, Harry Spendelow wrote to the plaintiffs'

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solicitors stating that he was leaving home for three or four weeks and that the matter, so far as he was concerned, must stand over until his return. On September 11, 1908, the plaintiffs' solicitors wrote to Harry Spendelow that they would be glad to hear further from him at his early convenience, to which letter they received a reply from Harry Spendelow dated September 14, 1908, stating that he had decided to take legal advice before proceeding any further with the matter and that they would therefore hear in due course either from his solicitor or himself. By an indenture dated September 23, 1908, Harry Spendelow was appointed a trustee of the testator's will in the place of William Barnard, and the testator's real estate was conveyed to William Spendelow and Harry Spendelow upon the trusts of the testator's will. It appeared from the evidence of Harry Spendelow that this appointment was made at his own suggestion in order to prevent, if possible, the appointment of a stranger as a co-trustee with or in substitution for William Spendelow so that he (Harry Spendelow) might deal with the situation which had arisen and thus avoid any further publicity being given to the fraud perpetrated by his brother William Spendelow. On September 29, 1908, the plaintiffs' solicitors again wrote to Harry Spendelow stating that they had heard nothing further in the matter of his brother's and sister's advances from the plaintiffs, and that unless they heard something definite by return the plaintiffs must take such proceedings as were open to them with regard to the moneys that remained due to them. This letter was intended to elicit an answer to the plaintiffs' counter-offer contained in the letter of August 12, 1908, and was so understood by Harry Spendelow, who on receipt of such letter consulted his solicitor as to whether he should accept the counter-offer or not. This consultation necessitated a reference to the two letters of August 8 and 12, 1908, and to Arthy's mortgage as well as to the plaintiffs' mortgage, both of which mortgages were then discussed between Harry Spendelow and his solicitor. As the result of the advice given to him at this consultation Harry Spendelow on October 3, 1908, wrote a letter to the

plaintiffs as follows: "W. Spendelow. Acting on the advice of my solicitor I now beg to say I can do nothing in the above and that the matter must take its course." Harry Spendelow in cross-examination stated that when he wrote this letter he had in mind Arthy's mortgage as well as the plaintiffs' mortgage, also the offer made by him and the counter-offer made by the plaintiffs' solicitors, and that he was fully aware that his brother was in some jeopardy and that he as trustee would have to deal with the two mortgages. He further stated that he would not have distributed the proceeds of sale without regard to Arthy's mortgage, and that it was a subject he was not likely to forget. The plaintiffs' solicitors answered the letter of October 3, 1908, on October 5, 1908, stating that they were taking their clients' instructions with reference to proceedings against William Spendelow. On October 28, 1908, Harry Spendelow wrote to the defendant Arthy, to the plaintiffs' solicitors, and to the solicitor for Ernest Meanley, informing each of them of the fact that by the deed of appointment of September 23, 1908, he had become a co-trustee with William Spendelow of the testator's estate. The plaintiffs' solicitors by letter dated October 30, 1908, acknowledged receipt of the letter of October 28, 1908, and stated "You are of course aware of the mortgages of your sister Mrs. J. Green's and your brother Mr. William Spendelow's respective shares in favour of our clients the Ipswich Permanent Money Club Limited." Over three years later—namely, on December 16, 1911, the defendant Turnnidge's solicitor wrote to Harry Spendelow stating that he had been requested to inquire whether he (Harry Spendelow) as one of the trustees had received notice of the defendant Turnnidge's mortgage. This letter was answered by Harry Spendelow on December 18, 1911, who stated that the defendant Arthy did not acquaint him with the fact that his brother had mortgaged his interest to the defendant Arthy until July 20, 1908, whereupon on December 19, 1911, the defendant Turnnidge's solicitor wrote to Harry Spendelow enclosing a formal notice of the defendant Turnnidge's security.

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On January 24, 1915, William Spendelow died, and the defendants Arthy and Playle were his executors. No proceedings were instituted by the plaintiffs against William Spendelow in his lifetime. The testator's widow Jane Spendelow died in the year 1916. In the month of June, 1917, the testator's real estate was sold by Harry Spendelow as surviving trustee of the testator's will. The net proceeds of such sale (after paying off the Meanley mortgage and further charges) were not nearly sufficient to satisfy the moneys owing in respect of both Arthy's mortgage and the plaintiffs' mortgage. On January 22, 1919, the plaintiffs commenced this action against William Spendelow's executors and the defendant Turnnidge, claiming a declaration that they were entitled to be paid out of William Spendelow's share of the proceeds of sale of the testator's real estate, the principal and interest secured by the plaintiffs' mortgage in priority to the payment of any moneys purporting to be secured by Arthy's mortgage.

The executors of William Spendelow entered an appearance to the writ, but took no further part in the proceedings.

W. G. Hart for the plaintiffs. The case raises the question of the application of the rule in *Dearle* v. *Hall* (1) as to the priority of incumbrances by notice. The proceeds of sale of real estate directed to be sold are on the same footing as personalty as regards notice, and whatever the form of the assignment may be, the rights of the parties are governed by the rule: *Foster* v. *Cockerell* (2); *Lee* v. *Howlett* (3); *Arden* v. *Arden* (4); *Ward* v. *Duncombe* (5); *Lloyds Bank* v. *Pearson*. (6) Secondly, the rule is independent of any consideration of the conduct of the competing assignees where the assignee second in date has no notice of the earlier assignment. Priority in such a case depends simply and solely on priority of notice: *Ward* v. *Duncombe*. (7) Thirdly,

(1) 3 Russ. 1.
(2) (1835) 3 Cl. & F. 456.
(3) (1856) 2 K. & J. 531.
(4) (1885) 29 Ch. D. 702, 708.
(5) [1893] A. C. 369, 376, 390–1.
(6) [1901] 1 Ch. 865.
(7) [1893] A. C. 369, 391.

notice which a trustee has by being himself the assignor is ineffective: *Browne* v. *Savage* (1); *Lloyds Bank* v. *Pearson* (2); *In re Dallas.* (3) Therefore, the notice or knowledge that William Spendelow had of Arthy's mortgage in 1903 was wholly ineffectual for the purpose of the rule in *Dearle* v. *Hall* (4) as against the plaintiffs. All that can be done where a sole trustee is assignor is to wait until some independent person gets legal control of the property and then to give him notice. The only way the plaintiffs could get priority was by giving Harry Spendelow notice after his appointment as trustee, and the plaintiffs' notice of October 30, 1908, was first in point of time because the defendant Turnnidge did not give his notice of Arthy's mortgage until December, 1911, and therefore the plaintiffs' mortgage is entitled to priority: Smith's Leading Cases, 7th ed., p. 124. Fourthly, the person to whom notice is given must have legal dominion over the fund. Notice given to a person who may become a trustee before he has become a trustee is ineffectual: *Buller* v. *Plunkett* (5); *Addison* v. *Cox* (6); *Johnstone* v. *Cox* (7); *Ward* v. *Duncombe* (8); *In re Dallas.* (9) Fifthly, formal notice in writing is not essential; a verbal and informal notice is sufficient provided the fact of the assignment is distinctly and clearly brought to the attention of the trustee: *Browne* v. *Savage* (10); *Lloyd* v. *Banks.* (11) I submit, therefore, that the knowledge that Harry Spendelow acquired in July and August, 1908, of his brother's mortgages was ineffectual to bind the trust estate, that the crucial date was the date of his appointment as trustee in September, 1908, and that the plaintiffs' notice to him after that date being first in point of time gives them priority.

Whitmore Richards for the defendant Turnnidge. The onus is on the plaintiffs to displace the priority of Arthy's mortgage which is first in point of date. Admitting that

(1) (1859) 4 Drew. 635.
(2) [1901] 1 Ch. 865, 870.
(3) [1904] 2 Ch. 385, 398, 411–12.
(4) 3 Russ. 1.
(5) (1860) 1 J. & H. 441.
(6) (1872) L. R. 8 Ch. 76, 79.
(7) (1881) 19 Ch. D. 17.
(8) [1893] A. C. 369, 384.
(9) [1904] 2 Ch. 385, 398.
(10) 4 Drew. 635, 640.
(11) L. R. 3 Ch. 488, 491.

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notice to William Spendelow whilst sole trustee would be ineffectual, it is beyond dispute that down to the appointment of Harry Spendelow as trustee Arthy's mortgage was first, and the plaintiffs must show that after Harry Spendelow's appointment they gave him a valid notice before he had notice or knowledge of Arthy's mortgage. Knowledge is higher than notice, and when Harry Spendelow was appointed trustee he already knew that Arthy's mortgage had been created in 1903, and that knowledge had been acquired in such a manner that from the moment of his appointment it continued to operate on his mind in such a way that as a reasonable man or an ordinary man of business he would, as he has said, act upon the knowledge he had acquired: *Lloyd* v. *Banks* (1); *Meux* v. *Bell* (2); *Ex parte Agra Bank* (3); *Smith* v. *Smith*. (4) The rule in *Dearle* v. *Hall* (5) is intended to prevent frauds, and the Court will not, it is submitted, apply it to a case in which it would give priority to a fraud. Moreover, in *Ward* v. *Duncombe* (6) Lord Macnaghten points out that the rule is not to be extended to a case not already covered by authority. *In re Dallas* (7) is distinguishable from the present case. It was a contest between charges, not on an existing trust fund, but on an expectancy, and really turned on the notice given to Mrs. Beedell after the grant of administration to her. But if the rule in *Dearle* v. *Hall* (5) applies, the plaintiffs' letters to Harry Spendelow in September, 1908, in effect gave him express notice of Arthy's mortgage so that he had it in his mind when he received the plaintiffs' letter of October 30, 1908.

W. G. Hart in reply referred to *In re Dallas*. (7)

Cur. adv. vult.

May 21. P. O. LAWRENCE J., after stating the facts, continued: The plaintiffs rest their case entirely upon their solicitors' letter of October 30, 1908, which they contend

(1) L. R. 3 Ch. 488, 491.
(2) (1841) 1 Hare, 73, 84.
(3) (1868) L. R. 3 Ch. 555.
(4) (1833) 2 Cr. & M. 231.
(5) 3 Russ. 1.
(6) [1893] A. C. 369, 394.
(7) [1904] 2 Ch. 385, 391, 402.

operated to displace the priority of Arthy's mortgage and to give priority to the plaintiffs' mortgage. The submissions made to me by Mr. Hart in support of this contention were, first, that the rule in *Dearle* v. *Hall* (1) applies to the plaintiffs' and Arthy's mortgages; secondly, that the knowledge which William Spendelow had of the mortgages created by himself was not an effective notice to operate on priorities within the rule, and consequently that the rule first became applicable when Harry Spendelow was appointed a trustee of the testator's will; thirdly, that knowledge acquired by or notice given to Harry Spendelow before his appointment as trustee of the testator's will had no effect, and therefore the dates of the notices given after his appointment must determine the order of priority; and lastly, that the first notice of the plaintiffs' mortgage given to Harry Spendelow after his appointment was the notice given by the letter of October 30, 1908, and consequently that the plaintiffs' mortgage ranks in order of priority before Arthy's mortgage.

It is, in my opinion, settled by authority that the rule in *Dearle* v. *Hall* (1) applies to the mortgages in the present case although the testator's real estate was still unsold when they were created, and although Arthy's mortgage purports to deal with an interest in land and not with an interest in money: see per Cozens-Hardy J. in *Lloyds Bank* v. *Pearson*. (2) In the next place, the Court of Appeal in *In re Dallas* (3) has decided that notice to, or knowledge of, a sole assignor trustee is not an effective notice to operate on priorities. I am bound, therefore, to dismiss from this case all considerations of the knowledge of William Spendelow and of the express notice given to him by the plaintiffs' solicitors on May 30, 1907. It follows from what I have stated that on the appointment of Harry Spendelow as trustee of the testator's will there came into existence for the first time a legal holder of the trust property to whom notice could be given so as to operate on the priorities of Arthy's and plaintiffs' mortgages.

(1) 3 Russ. 1. (2) [1901] 1 Ch. 865, 869.
(3) [1904] 2 Ch. 385.

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The question then arises whether the knowledge which Harry Spendelow had acquired of Arthy's mortgage prior to his appointment as trustee of the testator's will operated to protect the priority of that mortgage and to prevent the notice which the plaintiffs gave of their mortgage on October 30, 1908, from displacing that priority. In my opinion this question is not free from doubt, and its solution is not easy, owing to the admitted difficulty of accurately defining the principle on which the doctrine of notice as established by the rule in *Dearle* v. *Hall* (1) depends : see per Lord Macnaghten in *Ward* v. *Duncombe.* (2) It is well established that the rule does not render it necessary for an incumbrancer, in order to preserve the priority of his incumbrance, to prove that he gave notice of his incumbrance to the trustee of the fund. It is sufficient if he can prove—to quote the words of Lord Cairns in *Lloyd* v. *Banks* (3)—" that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shewn that in any way the trustee has got knowledge of that kind .... then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created." In the present case it has been proved conclusively that the mind of Harry Spendelow had before his appointment as a trustee been brought to an intelligent apprehension of Arthy's mortgage in such a way that as a reasonable man he would on his appointment as a trustee act upon the information he had acquired and would regulate his conduct in the execution of the trust by such information. The facts in this case are most convincing. Harry Spendelow procured himself to be appointed a trustee of the testator's will because he had

(1) 3 Russ. 1. (2) [1893] A. C. 369.
(3) L. R. 3 Ch. 488, 490.

learnt of the existence of Arthy's mortgage, and for the express purpose of himself dealing with the situation which had arisen by reason of that mortgage having been concealed from the plaintiffs. The knowledge which he had acquired shortly before his appointment was essentially of such a character that it would (and in fact did) continue to operate on his mind and oblige him after his appointment to regulate his conduct in the execution of the trusts by it. At the date of his appointment he had under his serious consideration a proposal made by the plaintiffs whereby it was suggested that he should take upon himself an onerous obligation in order to prevent or minimize the loss which was expected to result to the plaintiffs by reason of Arthy's mortgage having priority over the plaintiffs' mortgage. There is, therefore, conclusive proof in this case that before the date of the receipt of the letter of October 30, 1908, Harry Spendelow as well as William Spendelow not only knew of Arthy's mortgage, but also fully appreciated that in dealing with the trust property they would have to pay regard to that mortgage. But then it is suggested that I am bound by the decisions in the Army agents' cases and in *In re Dallas* (1), to ignore the knowledge which Harry Spendelow has been proved to have possessed because he acquired it before he became a trustee of the testator's will. The Army agents cases (a list of which will be found in the judgment of Buckley J. in *In re Dallas* (2) decide that a notice of an assignment of the amount to which an officer is entitled under 34 & 35 Vict. c. 86, s. 3, upon his retirement, given to the Army agents before the retirement of the assignor is gazetted, is of no avail either to give priority to such assignment over previous assignments of which no notice has been then given or to preserve the priority of such assignment over subsequent assignments of which notice is given to the Army agents after the retirement has been gazetted. This would appear to be the case even although the notice were given the day before the appearance of the retirement in the *Gazette* and although the notice were actually in the minds of the Army agents when the retirement

(1) [1904] 2 Ch. 385. (2) Ibid. 394.

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appeared in the *Gazette*. In my judgment, however, the Army agents cases do not apply to a case like the present. They come under the class of cases dealing with assignments of future property, expectancies and possibilities, and show that a notice of an assignment of a fund to which the assignor may become entitled given to the Army agents at a time when they are only possible stakeholders is of no effect as against a notice given to the Army agents after they have become stakeholders of the fund which has been appropriated to the assignor in respect of his commission. It is apparent from the decisions in the Army agents cases that in these cases priority depends purely and simply upon the date of the notices given by the assignees of their assignments, whereas there is ample authority to show that priority does not depend merely upon the dates of the notices given by the assignees in cases like the present, in which at the date of the assignment the assignee has an interest in an existing trust fund of which there is a legal holder; in such cases (as I have already pointed out) if the legal holder of the fund already knows of a prior incumbrance, this knowledge, however acquired, will protect the prior incumbrance and prevent its priority being displaced by a notice given by a subsequent incumbrancer. Although I know of no case in which the knowledge of the prior incumbrance had been acquired by the trustee before he had been appointed, yet if the kind of knowledge described by Lord Cairns in *Lloyd* v. *Banks* (1) is sufficient to protect the earlier incumbrance, it cannot in my opinion on any rational principle be material when that knowledge was acquired so long as it was acquired before the notice of the subsequent incumbrance any more than it can be material how the knowledge was acquired. It seems to me to be a somewhat irrational proposition that although a trustee knows and fully apprehends the nature and effect of an earlier incumbrance, yet he must be treated as not having that knowledge and apprehension when the acquisition of his knowledge took place before his appointment. In the present case it was impossible for Harry Spendelow to divest himself

(1) L. R. 3 Ch. 488, 490.

of the knowledge he had gained of Arthy's mortgage, and it is abundantly clear that his knowledge of that mortgage continued to operate on his mind after his appointment, and therefore that he knew of Arthy's mortgage prior to receiving the notice of October 30, 1908. Of course, no priority can be gained by a subsequent incumbrancer by a notice given to a trustee before his appointment, and it has been settled that incumbrances do not rank in order of accidental knowledge obtained by the trustee: per Kay J. in *Arden* v. *Arden*. (1) In my opinion the only effect of a trustee having before his appointment acquired effective knowledge of an incumbrance affecting the property of which he afterwards becomes a trustee is to prevent a subsequent incumbrancer, by giving notice of his incumbrance, from gaining priority over the earlier incumbrance of which the trustee had thus acquired knowledge, a result which I think completely harmonizes with the decisions in *Lloyd* v. *Banks* (2) and *Ward* v. *Duncombe*. (3) *In re Dallas* (4) has been much relied upon by the plaintiffs, but I do not think that it covers the point which I am now considering. It was there held that as the charges were charges of a possible interest under the will of a living person the case was governed by the Army agents cases, and further that when the fund charged came into existence, as there was then no legal holder to whom effective notice could be given, the charges ranked in order of priority according to the notices given to the person who subsequently had the legal dominion. It is true that in that case notice was on January 9, 1903, given to Mrs. Beedell, the person who became administratrix on March 4, 1903, but it was immaterial to consider the effect of that notice because a fresh notice was given to Mrs. Beedell on March 5, 1903, the day after the grant to her of letters of administration. I rather gather, however, from some of the passages in the judgment of Buckley J. that the learned judge did not consider that the notice of January 9, 1903, could have any effect, and he contrasts the knowledge of and the notices to the renouncing

(1) 29 Ch. D. 702, 708.
(2) L. R. 3 Ch. 488.
(3) [1893] A. C. 369.
(4) [1904] 2 Ch. 385.

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executor with the notices given to Mrs. Beedell after she became administratrix. In the Court of Appeal the notice given to Mrs. Beedell on January 9, 1903, was not alluded to at all, and neither Court considered the question whether, when a trustee has effective knowledge of an earlier incumbrance prior to the date of the notice of the subsequent incumbrance, such knowledge does not operate to protect the priority of the earlier incumbrance merely because it was acquired prior to his appointment. In these circumstances I do not consider that the decision in *In re Dallas* (1), which I need hardly say is binding upon me, compels me to hold that the knowledge acquired by Harry Spendelow before his appointment did not in the circumstances of this case operate to protect the priority of Arthy's mortgage.

Assuming, however, that I am wrong in the opinion I have expressed, it still remains to be considered whether on the facts Harry Spendelow, after his appointment on September 23, 1908, and before he received the notice of October 30, 1908, did not again receive notice or again acquire knowledge of Arthy's mortgage so as to prevent the notice of October 30, 1908, from operating to displace its priority in favour of the plaintiffs' mortgage. In my judgment the direct effect of the letter which the plaintiffs' solicitors wrote to Harry Spendelow on September 29, 1908, was to remind him of Arthy's mortgage. At the time of his appointment Harry Spendelow, as I have already stated, had under consideration the counter-offer which the plaintiffs had made on August 12, 1908, to take up Arthy's mortgage on certain terms, it was concerning this counter-offer that the plaintiffs by the letter of September 29, 1908, required to hear something definite by return. This letter was written with the object of again bringing prominently before Harry Spendelow's mind the situation created by the concealment of Arthy's mortgage and the necessity of making up his mind whether he and his mother would do anything to help the plaintiffs. In the circumstances this letter must in my opinion be read as if the counter-offer had been expressly repeated in it (or as

(1) [1904] 2 Ch. 385.

if express reference had been made in it to the letter of August 12, 1908, containing the counter-offer) and consequently as if it had in terms referred to Arthy's mortgage. The letter of September 29, 1908, had the desired effect; it reminded Harry Spendelow of the offer he had made and of the plaintiffs' counter-offer and impressed upon him the urgent necessity of stating whether he would accept the latter or not. He forthwith consulted his solicitor as to what he should do, discussed the plaintiffs' and Arthy's mortgages with him, and in the result decided to decline to move in the matter. The letter of September 29, 1908, therefore did in fact draw the attention of Harry Spendelow to Arthy's mortgage. In these circumstances I hold that the letter of September 29, 1908, gave to Harry Spendelow notice of Arthy's mortgage, and that the mind of Harry Spendelow was by that letter again brought to an intelligent apprehension of the nature of Arthy's mortgage so as to make Harry Spendelow as a reasonable man pay regard to that mortgage when regulating his conduct in the execution of the trusts of the testator's will. The fact that the letter of September 29, 1908, was written by the plaintiffs' solicitors is in my opinion immaterial, as knowledge or notice of a prior incumbrance acquired from or given by a subsequent incumbrancer is as effectual as knowledge or notice acquired from or given by any other person. Nor is it in any way material that the plaintiffs' solicitors, when writing the letter of September 29, 1908, did not know that Harry Spendelow had been appointed a trustee of the testator's will. The fact that the letter of September 29, 1908, gave notice of the plaintiffs' mortgage does not assist the plaintiffs' case, as in the event of simultaneous notices the mortgages rank according to their dates: see *Calisher* v. *Forbes*. (1)

In the result I hold that Harry Spendelow had already acquired knowledge or received notice of Arthy's mortgage before the receipt by him of the letter of October 30, 1908, and consequently that such letter did not displace the priority of Arthy's mortgage in favour of the plaintiffs'

(1) (1871) L. R. 7 Ch. 109.

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mortgage. The action therefore fails and will be dismissed with costs.

Solicitors for the plaintiffs : *Field, Roscoe & Co., for Aldous & Gotelee, Ipswich.*

Solicitors for the defendant Turnnidge : *Vizard, Oldham & Co., for F. T. Fisher, Southend-on-Sea.*

H. L. F.

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Jan. 14, 15 ; *March* 30.

In re WALLACE.

CHAMPION *v.* WALLACE.

[1918. W. 846.]

Will—Gift on condition of Donee obtaining Title of Honour—Baronetcy—Public Policy—Validity.

Testator by his will directed, in the events which happened, that the capital of his residuary estate, on the determination of certain prior trusts affecting the income thereof, should go to and vest in the testator's sole surviving son if he should have acquired the title of baronet or other title superior thereto; but if he should not have acquired the title of baronet or other title superior thereto the residue was to be divided in equal moieties between the British Treasury and the Treasury of British India :—

Held, that the conditional gift to the son was not void as being contrary to public policy, but was capable of taking effect on the fulfilment of the condition.

It is not the law that all conditions dependent on the acquisition of a dignity are contrary to public policy.

Egerton v. *Brownlow* (1853) 4 H. L. C. 1 distinguished.

Decision of Eve J. [1919] 2 Ch. 305 affirmed.

APPEAL from the decision of Eve J. (1)

Charles William Wallace, the testator, died on August 2, 1916, having, by his will dated January 20, 1912, appointed executors and trustees to whom he devised and bequeathed his residuary real and personal estate upon trusts for sale and conversion and investment, with power to postpone the same

(1) [1919] 2 Ch. 305.

in their discretion, and, subject to the payment of a certain annuity, directed that the annual income of his residuary estate should be divided equally between such of his five children—Charles William Wallace, Robert Wallace and three daughters—as should be living at the dates on which such income was realized, with a provision in favour of his grandchildren in case any child of the testator should die leaving children. By clause 16, the testator directed that when all claims upon the income of his residuary estate under the provisions thereinbefore contained should have become divisible under the provisions thereinafter contained, an account should be taken by the trustees of the capital as therein mentioned.

Clause 17 was as follows: "Subject to the provisions of the last-mentioned clause and to any outstanding claims on the income of my residuary estate I direct that the capital of my residuary estate shall go to and vest in either or both of my said sons who shall have acquired the title of baronet or other title superior thereto, or as such sons or son acquiring such title or titles respectively shall by deed or will appoint, and upon either of my sons acquiring such a title I direct that after such provision shall have been made as my trustees consider necessary for the protection of the rights of any of my other children or of any grandchildren of mine under the provisions hereinbefore contained in the income of my residuary estate, my trustees shall transfer and make over to my said son a moiety of the capital of my said residuary estate, and shall upon my other son acquiring the title of baronet or other title superior thereto in like manner transfer and make over to such other son the remaining moiety of the said capital, and shall also transfer and make over to my said sons in equal moieties such of the investments forming part of my residuary estate as may have been retained for the protection of the rights of any of my children in the income on the death of any child or children for whose protection they may have been retained; but if only one of my said sons shall acquire the title of baronet or other title superior thereto as aforesaid, I direct that my trustees shall on all claims of my said children, other than such last-mentioned

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son himself, to any portion of the income of my said residuary estate being satisfied, transfer and make over to such last-mentioned son or his appointees the balance of the investments constituting the same."

Clause 18: "If neither of my said sons shall acquire the title of baronet or other title superior thereto, then upon the death of the last surviving child of mine or any grandchild entitled to any portion of the income of my said residuary estate I direct that my trustees shall, subject to the provisions of clause 16, divide transfer and pay the capital moneys representing my residuary estate in equal moieties or the investments representing the same to and between the British Treasury and the Treasury of British India. I do this because I hold the view that, subject to the possessor's right during his life to the enjoyment thereof and to the making of adequate provision for his children until they are old enough to provide for themselves, all possessions great and small being acquired from or through the people as mine were should return to the people. I am not acting fully up to this view in the case of my children because the law, wrongfully I think, does not enforce it on all others and their children."

Robert Wallace died in the testator's lifetime without issue and without having acquired a baronetcy or superior title, and by a codicil to his will the testator directed his will to be read as if the name of Robert Wallace did not appear therein. The surviving son, Charles William Wallace, had not hitherto acquired a baronetcy or superior title.

An originating summons was taken out by the trustees of the will against Charles William Wallace and the three daughters of the testator and the Attorney-General and Secretary of State for India as defendants, for the determination of (inter alia) the questions: (1.) whether the gift of the residuary estate to the defendant Charles William Wallace, conditional upon his acquiring the title of baronet or other title superior thereto, was void as offending against public policy or otherwise; and (2.) whether (if the preceding question was answered in the affirmative) the gift over of the said residuary estate in the event of the said defendant

not acquiring such title failed, and whether the said residuary estate was undisposed of.

Eve J. held, distinguishing *Egerton* v. *Brownlow* (1), that the contingent gift to Charles William Wallace was not void as being contrary to public policy, but was capable of taking effect on the fulfilment of the condition.

Charles William Wallace and the three daughters of the testator appealed.

Maugham K.C. and *Luxmoore K.C.* for the appellants. The condition attached to both gifts is void as being contrary to public policy. It is a condition precedent and in the event of its not being fulfilled the alternative gift to the Treasuries fails and the capital of the residue goes as on an intestacy. The case is governed by the decision of the House of Lords in *Egerton* v. *Brownlow*. (1) The reasons given by the majority of the noble Lords in that case are now a fortiori. Eve J. has not really distinguished it. Two points arose there: (1.) whether the condition was precedent or subsequent, and (2.) whether it was void as being contrary to public policy. It is admitted here that the condition is precedent; the only question is as to its validity. In considering that question it is the tendency of the condition which is material, the inducement to use corrupt means in order to obtain the distinction. If the tendency is to cause a man to pay money to one of the great political parties with a view to corrupt the ministers of the Crown that is clearly injurious to the State and contrary to public policy. Since the decision in *Egerton* v. *Brownlow* (1) no one has attempted to impose such a condition as this. It may be argued that the case is distinguishable on the ground that the title to be obtained there was a peerage while here it is only a baronetcy, but that is not a material distinction. It is not possible to say that the condition in this case is not likely to lead to a man being improperly influenced in the performance of his duty.

In 1853 when *Egerton* v. *Brownlow* (1) was decided the insidious system of obtaining honours by making judicious

(1) 4 H. L. C. 1.

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contributions to party funds was not in existence. If gifts of property are made contingent upon the donee obtaining a title of distinction can it be supposed that there will be no tendency to use corrupt means in order to obtain it? The Court will take judicial notice of the fact that titles have sometimes been obtained by a subtle form of political corruption. The submission is that the condition is void and that the gift in clause 17 of the will fails.

But it is said that assuming that gift to be bad because the condition is void, still clause 18 will operate in favour of the Treasuries. The two clauses, however, must be read together. The condition cannot be good in clause 18 and bad in clause 17. The condition in both cases involves the same tendency and the whole disposition is contrary to public policy and therefore void. Another consideration is that the Crown itself ought not to be embarrassed in the distribution of honours, and that is another ground for holding the condition to be void. [He also referred to Sheppard's Touchstone, 132, 133.]

Austen-Cartmell for the Crown. The Crown can only take under clause 18 if Captain Wallace does not obtain a baronetcy. If he does acquire the title, however improperly, the Crown has no claim. If he should attain it even though he may not be able to avail himself of the gift under clause 17, the Crown cannot successfully claim. But in construing clause 18 it is possible to disregard clause 17. The two gifts are independent and alternative: *In re Davey.* (1) The effect of that case is that where there are two alternative independent gifts, the failure of one by reason of the gift being void, e.g., for remoteness, does not prevent the other taking effect if the event upon which it is to take effect happens.

Here the first gift is to one on condition of the happening of an event. If that event does not happen then the second gift operates and the Crown takes under it. The fact that the condition of the first gift is void is not material; the only question affecting the claim of the Crown is the non-happening of the event.

[LORD STERNDALE M.R. If the gift is upon a void condition

(1) [1915] 1 Ch. 837.

then the Crown cannot take. The first question is whether there is any valid gift at all.]

The gifts are independent and no condition is to be performed under clause 18.

Egerton v. *Brownlow* (1) was the case of a condition subsequent and was decided upon that footing. The condition was in defeasance, and the gift did not create any estate. If the condition had been precedent the judgment of the House of Lords might have been different.

[LORD STERNDALE M.R. With reference to the avoidance of the condition what difference does it make whether the condition is precedent or subsequent ?]

In the case of a condition subsequent it is not bad if it may be performed harmlessly ; in the case of a condition precedent it is not bad unless it is of such a nature that it must be performed impurely.

The general principle is well established ; its application depends upon the facts of each case.

Egerton v. *Brownlow* (1) is not to be extended to cases which are not in pari materia. Gifts on conditions clear in their tenor are not to be defeated on mere suspicion of the possibility of political trafficking.

There is a distinction in the nature of the dignity sought to be obtained. The considerations which apply to a title in the peerage do not attach to a lower title such as a baronetcy. The most that *Egerton* v. *Brownlow* (1) comes to is that a condition as to the attainment of a peerage is void.

The submission is :—

(1.) There is a material difference between conditions precedent and subsequent.

(2.) Clauses 17 and 18 are independent and the Crown will take if in fact the appellant does not obtain a baronetcy.

(3.) *Egerton* v. *Brownlow* (1) must be treated as applying solely to the case of a condition subsequent, and even if the condition here were to obtain a peerage it would be good.

(4.) The considerations which apply to a gift on condition

(1) 4 H. L. C. 1.

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of obtaining a peerage do not apply to a gift on condition of obtaining a merely social honour such as a baronetcy.

If, in fact, the appellant does not obtain a baronetcy the Crown will claim the property.

Sheldon for the trustees.

Maugham K.C. in reply. There is nothing in Sheppard's Touchstone to suggest that there is a different test of validity in the case of a condition precedent from that which is applicable to a condition subsequent.

The test is as put by Lord Lyndhurst in *Egerton* v. *Brownlow*. (1)

All the noble Lords took the view that the question to be determined was the tendency of the condition.

As to the suggested distinction between the character of the dignities to be obtained, the reason why the House of Lords said the condition was bad was not on account of any possible injury to the State, but because of its tendency to induce the employment of corrupt means to obtain the dignity.

Cur. adv. vult.

March 30. LORD STERNDALE M.R. The question in this case arises upon two clauses in the will of C. W. Wallace, who died on August 2, 1916. By his will he devised and bequeathed his residuary real and personal estate to his executors and trustees upon trusts for sale and conversion and subject to the payment of an annuity directed the annual income of his residuary estate to be divided equally amongst such of his five children, C. W. Wallace, R. Wallace and his three daughters, as should be living on the dates on which such income was realized with a provision in favour of grandchildren in certain events. Then followed clauses 17 and 18 upon which the question in this case arises. [The Master of the Rolls read those clauses and continued:] Robert Wallace died in the testator's lifetime without having obtained a baronetcy or superior title.

The trustees of the estate took out an originating summons

(1) 4 H. L. C. 1, 164.

asking that it should be determined whether: (1.) the gift of the residuary estate to the defendant, C. W. Wallace, conditional on his acquiring the title of baronet or other superior title was void as against public policy; (2.) whether the gift over in the event of the said defendant not obtaining such title failed.

It seems to me that the two gifts cannot for this purpose be separated; they are alternative gifts depending upon the same condition expressed affirmatively in the one clause and negatively in the other. If the condition be void as against public policy both gifts fail and there is an intestacy as to the residuary personal estate. This condition is clearly a condition precedent, and in that case if the condition be void as against public policy the gift fails. The contention that the condition is bad is supported by C. W. Wallace as well as the three daughters. The argument proceeded on two grounds: (1.) that such a condition tended to embarrass the Crown in the distribution of honours, and (2.) that it tended to induce the subject to avail himself of improper means to obtain the dignity. Not much stress was laid upon the former contention and I do not think it can be maintained. I do not think that those who advise the Crown in the conferment of honours would be embarrassed by the fact that to confer a baronetcy on the testator's son would secure to him a large sum of money, or that by refusing it they would secure that large sum of money for the British and Indian Treasuries. The real stress of the argument was laid upon the second contention, and it was urged upon us, as is no doubt the fact, that baronetcies, though often conferred for services other than political, are readily, perhaps more readily than otherwise, obtained by services to one or other of the political parties in the country. It was said, therefore, that the result of this condition would be to induce the beneficiary to render services to a political party irrespective of his conscientious convictions or opinions as to the merits of their measures and their principles, and by himself or by means of others to use sordid and dishonourable means to obtain the necessary title. It is indubitable that such a thing might happen, and,

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I suppose, it would be generally reprobated, but it is also the fact that such a title is often obtained by meritorious services, and that the titles of political supporters are not to be considered as necessarily obtained by improper means. It was, however, argued that this case is covered by the authority of *Egerton* v. *Brownlow*. (1) In that case the House of Lords had to consider a condition that if one of the persons concerned died without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body then the estate limited to the heirs male of his body should cease and be void. This was eventually after much difference of opinion held to be a condition subsequent, but I cannot see how the validity of the condition is affected by its being precedent or subsequent, though the effect of holding it to be invalid is different and possibly there may be more inclination to do so in one case than in the other.

The case referred to had a curious history. The condition was held good by Lord Cranworth sitting as Vice-Chancellor, and, on appeal to the House of Lords, the judges were summoned. Eleven judges attended and of them nine held that the condition was valid, and two that it was invalid. Four of the noble Lords—Lords Lyndhurst, Brougham, Truro and St. Leonards—held it invalid, and Lord Cranworth, who had then become Lord Chancellor, adhered to his former opinion. It was also the fact that the opinions as to its being a condition precedent or subsequent were divided in the same way. (2)

There appears to me to be much force in the reasoning of the nine judges who held the condition valid, that is, that in order to be invalid the condition must be one which necessarily or at any rate probably involved acts and conduct contra bonos mores, or against the welfare of the State as expressed by Talfourd J. (3): "The contravention of 'public policy' is a term of dangerous, because uncertain, use in the

(1) 4 H. L. C. 1.

(2) Lord St. Leonards thought it clear that it was not a case of condition at all, but of contingent limitations with shifting uses limited upon them: 4 H. L. C., p. 208.—F. P.

(3) 4 H. L. C. 96.

ascertainment of legal rights ; but it is true that if the object proposed by the testator were in its nature capable only of attainment by the violation of any law of God or man, or if he had prescribed or suggested such violation of morals or law, his condition or proviso would be void. But if his object only partakes the common quality of the objects of worldly ambition, that it may be sought either by base conduct or by generous exertion, can its possible operation to mislead an imperfect nature render the proposal vicious ? The acquisition of a certain amount of property, a marriage with a nominated party, or a seat in the House of Commons, may be sought by evil means ; but is it to be assumed, contrary to the ordinary presumption of law, that evil means will be employed ? If it is a legitimate assumption in legal argument that a peerage is attainable by the corrupt use of political influence corruptly obtained, it will be further necessary to the conclusion, to maintain that the employment of such means is contemplated in the proposal of the dignity." Then Baron Alderson (1) says : " The principle, then, to be extracted from all this, seems to me to be, that in all the ordinary transactions of business or contract in human life, if the object expressed be impossible or illegal, the condition is void ; and that if it be physically possible, but impossible except by doing an illegal act, it is void also. But that the mere tendency, on some remote and not very probable supposition, that what is not expressed to be the object may, nevertheless, possibly be considered to be the object, will not make the condition void." Eve J. seems to me to have adopted this reasoning, but I do not think it is open to us to do so, as it was expressly rejected by the majority of the House of Lords. See, especially, the words of Lord Truro (2) : " I shall, therefore, assume that a disposition of property by will, equally with a disposition in any other form, which has a tendency injurious to the public interest or good, the law will not uphold, and the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition ; and if the law is to be

(1) 4 H. L. C. 109. (2) Ibid. 196.

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practically applied, it cannot be administered with reference to the character of the individuals to whom the question may relate." This, however, leaves the matter in some doubt, for tendency is not an easy word to define, and it is not satisfied by a mere possibility that a person may do improper acts in consequence of the existence of the condition. There were two important elements in *Egerton* v. *Brownlow* (1) upon which stress was laid, which do not exist here. In the first place, the condition required the acquisition of a dukedom or a marquisate, that is, the highest or the second rank in the peerage, and it was considered that very special efforts would be required to obtain such a high rank, and that such efforts would have a tendency to go too far. Lord St. Leonards says (2): "Now, my Lords, observe what Lord Alford would have to do in five years, let his age be what it would when the earldom came to him. He must procure a dukedom or marquisate, and this particular dukedom or marquisate, with particular limitations, or the estates are to go over. It is said that the testator did not mean that the title should be acquired by anything but merit. What merit, in five years, could enable any man so to ennoble himself? Is it to be in the Senate?—is it to be in diplomacy?—is it to be in the Army or the Navy, or in the law? How is he to determine where his services are to be given, or his talents exercised, in order to entitle him in five years to the most distinguished mark of favour which the Crown has it in its power to bestow upon a subject? It appears clearly to me, therefore, that this is not a question turning upon the grace and favour of the Crown, but is a case of a vast estate given to a person in order to feed the posthumous vanity of the testator, that he might die in the belief that his estates would once more be annexed to a dukedom or marquisate of Bridgewater, and he, for this purpose, furnished the means, and with them the temptation to exercise them, in order to obtain that dignity." Secondly, the title when obtained was that of a peerage which conferred legislative rights and duties upon the holder

(1) 4 H. L. C. 1. (2) Ibid. 237.

of it. Baronetcies are more easily obtained than dukedoms or marquisates, and when obtained they are mere titles, and involve of themselves the performance of no duties, legislative or otherwise, other than those of any good but untitled citizen. As pointed out by Eve J., Lord Lyndhurst (1) recognized that each case must depend on its own circumstances, saying: "What cases come within the rule must be decided as they successively occur. Each case must be determined according to its own circumstances. . . . . Whether the particular case comes within the rule it is the province of the Court in each instance, acting with due caution, to determine." Still, it was maintained before us that the effect of the judgment in that case must be taken to be that any condition requiring the acquisition of an honour from the State of any kind must have a tendency against public policy. Lord Cranworth, in his judgment as Vice-Chancellor, says that the contention in the case involved that result, but it is true that he said so only to show that in his opinion the contention could be maintained. I have had, and have, great doubts whether the noble and learned Lords did not intend to lay down that principle, and some of their observations, especially those of Lord Brougham, seem to go to that length, but both of the other members of the Court are of opinion that this case does not fall within the decision of *Egerton* v. *Brownlow* (2) and I, therefore, assent to the decision that this appeal should be dismissed.

WARRINGTON L.J. By the will of Charles William Wallace, who died on August 2, 1916, and in the events which happened, the capital of the testator's residuary estate was in effect directed to be held in trust for his son, Charles William Wallace, if he should acquire the title of baronet or other title superior thereto, and if he should not acquire such title then it was directed that such capital should be divided equally between the British Treasury and the Treasury of British India.

(1) 4 H. L. C. 160. (2) Ibid. 1.

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The testator (a widower) left him surviving his said son and three daughters who were his next of kin. The son was also his heir at law. They insisted that the conditions annexed to the foregoing dispositions were void as being contrary to public policy, and that as those conditions are conditions precedent the effect is to avoid the dispositions themselves, and consequently the testator died intestate as to the capital of his residuary estate. In support of their contention they relied on the decision of the House of Lords in *Egerton* v. *Brownlow*. (1) Eve J. has held that the disposition in question is valid and capable of taking effect in either branch of it according to the event. The son and daughters appeal.

There is in the present case no question that both conditions are precedent, and the result is according to well-known principles that if they respectively are void the dispositions dependent on them fail; whereas if the conditions were subsequent and void the dispositions which they purported to affect would take effect whether they were performed or not.

The contention is that the conditions are void as being contrary to public policy. It is said that all dispositions dependent on the acquisition of a title or dignity in the gift of the Crown are contrary to public policy, and that this is the effect of the decision in *Egerton* v. *Brownlow*. (1) This was a very remarkable case. The judges were summoned to advise the House on the question of the validity of the condition in that case; nine judges advised that they were legal, and two that they were illegal. Five noble Lords took part in the decision. Four, namely, Lord Lyndhurst, Lord Brougham, Lord Truro, and Lord St. Leonards, held that the conditions were contrary to public policy and void. The Lord Chancellor, Lord Cranworth, adhered to his own decision in the Court of Chancery that the conditions were valid. The case arose upon the will of the seventh Earl of Bridgewater which contained a provision that if one of the persons, in effect, made tenant for life of certain estates should die without having acquired the title of Duke or Marquis of Bridgewater

(1) 4 H. L. C. 1.

to him and the heirs male of his body then the estate thereby directed to be limited to the heirs male of his body should cease, and be void. There were certain other conditions in question, but it is enough to mention the one. The tenant for life, who was a commoner, died without having acquired either of the titles in question. His eldest son claimed the estates as tenant in tail male by purchase, insisting that the condition was subsequent and void, and the House of Lords adopted that view, reversing the decree of the Court of Chancery to the contrary effect. The case, in my opinion, clearly decided this, that in determining whether a disposition or property is void as being contrary to public policy its tendency is alone to be considered, and if it has a tendency to bring about some mischief to the commonweal then it will be void, although the mischief may not be the necessary, or even the probable, effect of the disposition. Tendency as contrasted with necessary or probable effect was, in substance, the main subject of debate, and the decision of this point in favour of the appellant really won him the day. Eve J. in his judgment says (1): "In my opinion, in determining whether the condition is or is not void as being opposed to the public good, the Court ought to ascertain whether its fulfilment necessarily involves any act or conduct contra bonos mores or against the welfare of the State; if it does not, it is valid even though its fulfilment is capable of being brought about by acts and conduct opposed to the public welfare." In saying this the learned judge was, in effect, adopting the view which was rejected by the House of Lords, and, with all respect, I cannot regard his statement as a correct statement of the law. Lord Lyndhurst says (2): "The enquiry must in each instance . . . . have been into the tendency of the act to interfere with the general interest." Again, Lord Brougham expressed the view (3) that "the tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded." Lord Truro says (4):

(1) [1919] 2 Ch. 311.
(2) 4 H. L. C. 161.
(3) Ibid. 174.
(4) Ibid. 196.

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"The law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition." There are other passages to the same effect which might be referred to.

So far, then, I agree with the criticism of the appellants on the judgment of the learned judge. But then arises the question: Is it made out by the appellants that the conditions in this case have, or that either of them has, a tendency injurious to the public interest or good? In considering this question it must be carefully borne in mind that the tendency which must be found if the condition is to be invalidated is a tendency to produce injury to the public interest or good, or to the commonwealth, to use various phrases found in the judgments in *Egerton* v. *Brownlow*. (1)

To take the condition on which the right of Major C. W. Wallace to the capital of the estate depends, what is said is that it tends to induce him with the object of acquiring the estate to do, for the purpose of obtaining the title, acts which would be injurious to the public interest or good. If this is made out then I think we are bound by the authority of *Egerton* v. *Brownlow* (1) to say that the condition is void as contrary to public policy. At the same time, in considering whether the condition has the tendency referred to we are bound carefully to examine the circumstances of the particular case, and to exercise great caution lest we unduly extend the doctrine of public policy which it has often been said is not one to be extended except for cogent reasons. Lord Truro, in *Egerton* v. *Brownlow* (2), says: "Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation." Again, in the *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) Lord Bramwell says: "'Public policy,' said Burrough J. (I believe

(1) 4 H. L. C. 1. (2) Ibid. 197.
(3) [1892] A. C. 25, 45.

quoting Hobart C.J.) 'is an unruly horse, and dangerous to ride.' I quote also another distinguished judge, more modern, Cave J.: 'Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.'" I think, therefore, we ought not to hold that the disposition in question is obnoxious to the law unless we are satisfied beyond reasonable doubt that it has the mischievous tendency referred to above.

We have to consider a disposition of property depending on the acquisition of a baronetcy. I do not forget the additional words: "Or other title superior thereto," but inasmuch as the condition would be fulfilled by the acquisition of the inferior title there is no inducement to the donee to endeavour to acquire the higher one, and I think we may, for this purpose, deal with the condition as if it were confined to the acquisition of a baronetcy. A baronetcy is a barren title involving on the part of its holder the performance of no duties to the State, or the public, except those which are cast upon every good citizen. In this respect it differs most materially from a peerage, the subject of discussion in *Egerton* v. *Brownlow*. (1) The public neither gains nor loses by the title being conferred. If the holder has proved himself a good citizen he will not become a better one by reason of his having acquired the title. If he is a bad one, the title will not make him worse, in fact the possession of such a title by an individual is a matter of indifference, so far as the welfare of the State, or of the public at large, is concerned. From one point of view the disposition we are considering tends to the public good, because it tends to induce the donee to do such service to the State, or the public, as may render him deserving of honour, but it is said that the prospect of obtaining the property has also this mischievous tendency that it may induce the donee to use means to acquire the title, the use of which may be mischievous to the State. For example, it is

(1) 4 H. L. C. 1.

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suggested that one of the means by which such a title may be obtained is the payment of money to the funds of one or other of the political parties, and another, applicable only in the case of a man who is in Parliament, a persistent obedience, from interested motives, to the dictates of the leaders of the party to which he belongs. Where the object to be obtained is something the obtainment, or non-obtainment, of which is indifferent to the public interest I am unable to say beyond doubt that either of the means suggested would be injurious to the State, or the public. If the state of the public morality were such that the donee might be induced to obtain the title by direct bribery of those whose duty it is to advise the Crown, then the case might be different, but, happily, such an attempt may, I think, be regarded as out of the question.

On the whole then I am unable to say that the disposition in question has beyond doubt the injurious tendency above referred to, and, if so, unless there is authority which directly governs the case I think I am bound to say that in my opinion the disposition we are considering is valid and effectual.

The only authority which can be relied upon as determining the point is *Egerton* v. *Brownlow*. (1) Now, as I have already stated, the subject-matter of that case was a disposition depending on the acquisition of a peerage. The speeches of all of the noble Lords who addressed the House in favour of allowing the appeal lay great stress on this fact, and enlarge upon the necessity in the interests of the public that the conferring of a peerage, with the important duties attached to it, ought to be free from all interference for motives of personal interest, and the case must, I think, be regarded as a decision confined to such a disposition as was then in question. It is true that there are to be found in the speeches of some of the noble Lords more general expressions such as "acts of State," but so far, if at all, as those expressions carry the decision further than the particular question before the House, they can only be regarded as dicta. In my opinion the actual decision does not bind us

(1) 4 H. L. C. 1.

to hold that the disposition we are dealing with is contrary to public policy, and for the reasons I have given above I do not think we ought so to hold.

The result is that in my opinion the disposition in favour of Major Charles William Wallace is valid and effectual, and if this is so it follows that the alternative disposition in favour of the English Treasury and Indian Treasury is also valid and effectual. The declaration made by Eve J. was therefore, in my opinion, correct, and though, as appears above, I do not altogether agree with the reasons given by the learned judge, I think his order ought to be affirmed, and this appeal dismissed.

YOUNGER L.J. The will and codicils of this testator indicate that he held pronounced views upon what he conceived to be the properly permissible limits of testamentary disposition. In making the British Treasury and the Treasury of British India his ultimate residuary legatees he thus explains himself: "I do this because I hold the view that, subject to the possessor's right during his life to the enjoyment thereof and to the making of adequate provision for his children until they are old enough to provide for themselves all possessions great or small being acquired from or through the people as mine were should return to the people. I am not acting up to this view in the case of my children because the law, wrongfully I think, does not enforce it on all others and their children." Presumably the testator is here referring to the life interests given to each of his children: and, if so, he has, in two instances, very obviously induced by the same order of ideas, departed even further than he here acknowledges from this so-called view of his. For, first, with reference to what may be called his hereditary or family possessions, in popular phrase, his heirlooms, he has by clause 7 of his will given them for his life to his brother carefully described in his will as "General Alexander Wallace, C.B.," and after his death to his, the testator's, sons and grandsons in the male line in a very definite order of priority. And next, in the special provisions with which this appeal is concerned, namely,

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those contained in clauses 17 and 18 of the will, he directs that the capital of his residuary estate, subject to the payment thereout of the income and other burdens imposed by the will upon it "shall go to and vest in either or both of my said sons who shall have acquired the title of baronet or other title superior thereto or as such sons or son acquiring such title or titles respectively shall by deed or will appoint," providing further by clause 18 that if neither of his sons shall acquire the title of baronet or other title superior thereto, then, subject to the same burdens, the capital of his residuary estate is to be divided between the British Treasury and the Treasury of British India as already stated.

Now it is, I think, not doubtful that the testator in making these dispositions was, in both instances, flattering a sentiment of family pride, and in the second, had it also in mind apparently to discharge the duty he conceived he owed to the family name by endowing to the full extent of his ultimate residue each or either of his sons—not, it will be noted, one of them only—if it should happen that he obtained the dignity of a baronetcy or some other superior title. The question now is whether that condition precedent to the gift is so contrary to public policy as to be illegal and void, inoperative in itself and destructive of the bequest which is dependent upon it.

We are not of course here concerned with the reasonableness or otherwise of the testator's requirements. The law permits to testators the utmost eccentricity of disposition, and, this being conceded, it is certainly not immediately obvious how and in what way the public good is likely to be menaced by a recognition of the validity of this particular condition. There is not in this will, as there was in that of Lord Bridgewater, to which so much reference must hereafter be made, any special eagerness manifested by the testator himself that either of his sons should obtain such a title as he indicates. The gift, moreover, follows upon the acquisition of the title: it does not precede it—an incident which in such a connection will be found to be of real significance. In short, there is nothing apparent on the will to indicate more than this, that this

testator is providing the means of fittingly maintaining a hereditary distinction should one fall to the lot of either of his sons. It is, as if, with one son in the Church, the testator had made this bequest in his favour should he become a Bishop that he might thereby more fittingly exhibit in his Bishopric the episcopal grace of hospitality, or, with another son in political life, he had made this bequest in his favour, should he become, say, a Cabinet Minister in order that his pecuniary independence being once for all safeguarded he might thenceforth be free of all material anxieties whether in office or out of it. One would surely have to examine with jaundiced eyes such a condition as either of these before one could detect in it any tendency subversive of the common good whether of Church or State. And if it be asked whether there is any difference in principle between the terms of the testator's will as we have them and those which have just been supposed, I can think of no relevant difference which is not in favour of the condition as it is here contained, especially when it is borne in mind that to a baronetcy no public duty or responsibility of any kind is attached. Indeed with reference to the condition in this will it seems not unreasonable to say that if it have any general tendency or be calculated to stimulate any kind of action on the part of the legatee at all, it would be in the direction of enlisting his activities in the service of the community in some such work of public distinction or benevolence as would be suitably recognized by the grant in his favour of the baronetcy or other superior title which the testator thereupon endows. And if so it is surely innocuous.

And this was the view of the learned judge from whom this appeal comes, a view which, be it observed, in no way requires one to ignore the possibility that such a distinction may sometimes be more easily obtainable by less commendable, not to say less reputable methods. Sources of information open to all suggest that possibility. To deny it would, as Lord Truro said in *Egerton* v. *Brownlow* (1) be "to adopt a sentimental theory of purity, which, in

(1) 4 H. L. C. 203.

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truth, is not applicable to the present, and as to which I doubt whether it was applicable to any former, or will be applicable to any future, period of the history of this country." Indeed it may be recognized as a commonplace that so long as titles remain an object of ambition so long will some aspirants stoop, in their zeal to obtain them, to most questionable methods, and it may be that such methods do not always fail to attain their end. But the desire for some form of public recognition of personal worth or service is as an object of ambition neither mean nor unworthy, while the hope of such recognition on the part of the aspirant—or perhaps even more potently on the part of his household—may be a real incentive to notable public effort or usefulness and so directly conducive to the common good. And if such is the true tendency of the condition here, effective criticism, as I have indicated, is silenced. But that it is said by the appellants is not its true tendency. Its real tendency, namely, one subversive of the public good, was it is said authoritatively laid down by the House of Lords in *Egerton* v. *Brownlow* (1) in a decision the principle of which is binding upon every Court including the House itself, so that all that has here to be done is to apply that principle to the present case and obey it.

The first great question, therefore, is what does the decision of the House of Lords in *Egerton* v. *Brownlow* (1) really involve ? Does it apply to such a case as this ?

Now, it is not easy to state with succinctness the effect of a deliverance which occupies 264 pages of the report, deals with a will of extraordinary complexity and contains nine elaborate opinions of the eleven judges consulted by the House and five judgments of the noble and learned Lords who were present. Nor is the task simplified by the fact that the decision was reached by four of the five Lords supported by the opinions of the Lord Chief Baron and Platt B. only, the opposite view being taken by the Lord Chancellor supported by no fewer than nine of the

(1) 4 H. L. C. 1.

consulted judges. Without, however, endangering accuracy for the sake of brevity the following may, I think, for present purposes be taken as a sufficient statement of the case and its result. The will was that of the seventh Earl of Bridgewater. It was made on March 31, 1823. The testator died on October 21 in the same year. The question at issue related to estates of a value of over 2,000,000*l.* sterling with an income of over 70,000*l.* a year. The case came before the House in the summer of 1853, the question arising on the death of the testator's great-nephew, Lord Alford, eldest son of Earl Brownlow by his then late wife Sophia, Countess Brownlow, a niece of the testator. The testator who died without issue, having explained in a codicil that the object of the limitations contained in his will was to unite his estates to the title of Duke or Marquis of Bridgewater if it should be the pleasure of the Crown to create such title so as to come to the heirs male of Earl Brownlow and his issue male by his late wife Sophia, after certain prior limitations devised the estates in question to Lord Alford for the term of ninety-nine years, if he should so long live, with remainder to the use of the heirs male of his body with a proviso that if Lord Alford should not in his lifetime acquire the dignity of Duke or Marquis of Bridgewater, the estates should pass from the heirs male of his body immediately on his decease; and that if he, having succeeded to the Earldom of Brownlow, should not acquire the dignity within five years, the estates should pass from himself as well as from his heirs, the testator declaring that the creation of Lord Brownlow the father as duke or marquis with limitations to the heirs male of his marriage with the testator's niece was to be deemed to be equivalent to the acquiring the dignity by Lord Alford himself. The will also contained elaborate provisions requiring that the title of Duke or Marquis of Bridgewater adequate to comply with the testator's conditions must be limited in a somewhat unusual order of succession prescribed by the will and must have precedence over any other title even of the same rank appertaining to its holders. The following observations of Lord

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St. Leonards with reference to this part of the will are instructive as showing how he regarded the whole instrument (1): "I say, my Lords, that it is an indignity, an insult offered to the Crown, that a man shall point out the particular title which he will have, and the particular limitations to be attached to that title; that he shall prohibit a party from taking any other title which should interfere with his view; that he shall insist upon what the Crown itself cannot accomplish, namely, as in one of the clauses, that the dignity to be taken shall have a certain precedence. The Crown of itself has no power to do that which this ambitious testator desired to be accomplished. Is the Crown to be placed in that difficulty?" And so on. This passage illustrates the temper in which, doubtless quite properly, some of their Lordships approached the problem before them.

Lord Alford had died without obtaining the necessary dukedom or marquisate, and his heir at law claimed the estates notwithstanding the non-fulfilment of that prescribed condition on the ground that it was a condition subsequent and was against public policy and void. It was of course essential to the claimant's case to establish both points. Had the condition been a condition precedent he would have had no claim. For it had not been fulfilled; moreover, if it were as such illegal, his own estate would have been involved in its destruction. And he, at the last, succeeded in both his contentions.

The majority of the House of Lords, as I have said, advised by two of the judges, held that the condition was a condition subsequent and was illegal and void. The Lord Chancellor, supported by nine of the judges, held that it was a condition precedent and was moreover good and valid. It is noticeable that no one who held the condition to be a condition precedent held it to be bad—as the appellants here ask the Court to do, and the point is not unimportant as will later appear.

Now it is not possible to read the report of the case without being impressed by the fact already alluded to that the whole

(1) 4 H. L. C. 235.

will there, its temper and pretensions, pretensions be it observed which have no counterpart in the will of this testator, were obnoxious to the majority of the House. I have cited a passage from Lord St. Leonards' judgment as indicating this. The decision cannot, however, be disposed of on any such general ground, although it may be largely so accounted for, and a closer analysis of the actual grounds of the judgment makes it clear that the noble and learned Lords who constituted on that occasion the majority of the House held the condition there to be bad because of its tendency to promote unlawful acts. Tendency, they held, was enough and they rejected the view expressed by the majority of the consulted judges that in order to sustain the proposition that the condition was against the law it must, in Williams J.'s words (1), "be made to appear either that the provisos have an unlawful object, or that, in order to their performance, they require some act or course of conduct which is malum in se or malum prohibitum; or that they forbid the doing of something which the law requires to be done, or impose some restraint which is against law, as being mischievous to the community." That view, as I have said, was definitely rejected by the House, and it is not therefore possible, in my judgment, to escape from the decision of *Egerton* v. *Brownlow* (2) by now adopting it as Eve J., I think, must be taken to have done in the following passage from his judgment (3): "In my opinion, in determining whether the condition is or is not void as being opposed to the public good, the Court ought to ascertain whether its fulfilment necessarily involves any act or conduct contra bonos mores or against the welfare of the State; if it does not, it is valid even though its fulfilment is capable of being brought about by acts and conduct opposed to the public welfare."

In my judgment *Egerton* v. *Brownlow* (2) definitely lays it down that that is not the test. Tendency to illegality is enough. Tendency, however, there must be; and it is necessary now to discover where in the *Bridgewater Case*

(1) 4 H. L. C. 77.
(2) Ibid, 1.
(3) [1919] 2 Ch. 311.

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the House decided to find it and whether the tendency can be found here.

And, first, there can in my judgment be no question that the House relied in support of their conclusion on the fact that the condition there was a condition subsequent and not precedent. It did not create: it determined and destroyed, as Lord Lyndhurst put it. The point was important from two points of view—the first more or less technical, the second most substantial. As to the first or more technical ground, the Court, as is well known, is always reluctant to divest a vested estate. "It is a general rule," says Sheppard's Touchstone, 133, 134, "that such conditions annexed to estates as go in defeasance, and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases . . . . and in case where a condition doth tend to create an estate, there it shall have the most favourable exposition that may be." The condition subsequent accordingly received the strictest construction. I recall, in passing, that in the present case the condition is admittedly a condition precedent. But, secondly, the fact that the condition was for another reason in *Egerton* v. *Brownlow* (1) a condition subsequent had a most vital influence on the decision. Lord Alford by the will was, irrespective of the condition, placed in possession of vast property with an annual income of over 70,000*l.* a year. The testator left him an immense landed estate—as the Lord Chief Baron put it in an opinion adopted by the majority of the House, "to enable him to acquire or obtain or procure the title in question with the ominous condition that if he did not get it, he himself should in one event and his family in another lose the estate: and the question is, Is this a lawful condition to annex to an estate?" "The proviso," says Lord Brougham, "gives Lord Alford the strongest inducement to use the means of unduly influencing the dispensers of Royal favour, and the will places those means at his disposal in an ample measure. A revenue of 60,000*l.* a year and upwards depends upon his

(1) 4 H. L. C. 1.

obtaining the dignity : and that large income may be employed with the influence of his rank and station to boot in furthering the attainment of this end." Again he says : " If the testator had been asked whether he did not contemplate Lord Alford becoming a duke or marquis, either through the public services of his father thereby exalted or through his own services in after life, he would in all likelihood have thought the question designed to turn him into ridicule." Lord Truro is equally express. The testator, he held, never could have contemplated any legitimate means by which the title could be acquired by Lord Alford, nor could he have anticipated the use of any other methods than Parliamentary or private influence obtained through the resources he had furnished. In other words, these noble Lords found in the condition there one which could only have fulfilment by judicious application of the means placed by the testator at the disposal of the legatee for the purpose. The case, in short, was in their opinion identical in principle with that of *Kingston* v. *Pierepont* (1), which Lord St. Leonards (2) interpreted as a case in which a testator had placed in the hands of the legatee a sum of money to obtain a dukedom by any means, however unlawful.

Now in this cardinal respect there is of course no similarity at all between Lord Bridgewater's will and the present. Here nothing passes to the legatee until he has obtained his title. Up to that moment he receives, with his sisters, no more than his aliquot share of income. And it does so also happen that this testator, probably quite unconsciously (because the possibility was not, I conceive, ever present to his mind), but none the less effectively, has at least freed his particular condition from any taint of the grosser kind to which reference has just been made. Not only does the legacy follow and not precede the title, but the residue which the legatee receives, if the title is conferred, goes by the testator's direction to the State, if it is not. In other words, the personality of the beneficiaries under the gift over is there to warn the legatee, if any such warning

(1) (1681) 1 Vern. 5. (2) 4 H. L. C. 230.

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were necessary, as I should hope and believe it is not, that all pecuniary blandishments on his part exhibited in the hope of adequate titular favour to come will be useless.

But there was another aspect of the *Bridgewater Case* and, again, with no necessary counterpart here, which led the majority of the House of Lords to find in the will there a tendency contrary to the public weal. In that case, as it was put by Lord Lyndhurst, an estate of great extent and value was made to depend upon a creation or promotion in the peerage. And the importance of this aspect of the matter is thus expressed by him (1): "The duties incident to the peerage are of the gravest and highest character; and in the proper discharge of them the interests of the Crown and the public are deeply concerned. These duties are both legislative and judicial; in addition to which, a peer of the realm has a right, when he deems it necessary, to demand an audience of the Sovereign and to tender his advice respecting public affairs. In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature. He acts judicially, not merely in the appellate jurisdiction of the House, but also in the various matters usually referred to Committees, in which the strictest independence is to be observed, and all foreign influence of every description to be carefully avoided. Such is a position and such are the duties of a peer of the realm, and it follows that any application or disposition of property which has a tendency to interfere with the proper and faithful discharge of these duties must be at variance with the public good, and consequently illegal and void." And later on he says (2): "The question, then is, whether, a proviso such as we are considering would have, if acted upon, a tendency to influence improperly the performance of those duties to which I have referred. I think it would." The Lord Chief Baron expresses the same view in this way (3): "The framer of this will seems to have thought of nothing but the title and

(1) 4 H. L. C. 1, 161. (2) Ibid. 164. (3) Ibid. 153.

dignity of a peer, and to have overlooked his important duties, and the interest which the public have in the correct discharge of them ; he seems to have considered the peerage as merely giving a high position in the table of precedence, as being a bauble, the subject of bargain or barter, contract or condition, and to have forgotten that a peer is at once a legislator and an expounder of the statutes, that it is his office to frame and also to decide upon the law, and that he has, in the constitution of this country, duties to perform of the greatest importance to the public welfare."

These observations mark the other great distinction in this respect between the Bridgewater will and the present. Here a baronetcy is a compliance with the condition, a mere "bauble" in the Chief Baron's words : the subject of bargain or barter if we go back to the date of its institution, when it could be had from King James I. for a payment of 1095*l.* (1)

In my judgment, therefore, there is no real analogy between *Egerton* v. *Brownlow* (2) and the present case. The circumstances are totally different ; the determining factors there are non-existent here ; the reasoning instructing the decision is inapplicable to this will.

And counsel for the appellants, possibly because he felt this, strove to make the analogy closer by suggesting that the governing tendency of this bequest was to induce the legatee to ally himself to one of the great parties in the State, to subscribe largely to that party's funds in the expectation, indeed he suggested on the terms, that the necessary dignity in due course would follow. The mischievous result from a public point of view was, he suggested, twofold. The condition tended to induce a grant of honours in return for political support ; it tempted the legatee to place his political conscience in the hands of his party managers, and in expectation of some titular reward to act by their direction regardless of his own convictions.

(1) Not as of course : the conditions and safeguards may be seen in Selden's Titles of Honor ; whether they were regularly observed may be a question.—F. P.

(2) 4 H. L. C. 1.

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The first answer to these suggestions, I think, is this. You do not find in them or either of them the true tendency of the gift. But if, contrary to that opinion, the reasons for which I have already given, the true tendency is to be found where counsel for the appellants has placed it, the question would still remain whether that tendency was subversive of the public good.

Now it is true that this question has to be determined without regard to the personality of the particular legatee. It is irrelevant therefore that Captain Wallace himself may have no taste for politics and no intention, even the remotest, of taking up a political career. Further, it is also true that the question whether or not a particular condition is or is not contrary to public policy has to be determined by the Court without evidence. The tribunal, says Lord Bramwell in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1) is to say as matter of law that the thing is against public policy and void. How can the judge do that without any evidence as to its effect or consequences ? Still he has to try. These suggestions therefore of counsel for the appellants cannot be disposed of either by a reference to the personality of the legatee or by showing that they are unsupported by any evidence. But this helps to indicate, as I think, one sufficient answer to them, although there are doubtless many others, and that answer is that the so-called public good of which it is here suggested the tendency of the condition is subversive, is not the kind of public good with which in such cases the Court alone has to do. At the root of each of these suggestions of counsel for the appellants lies the question whether the maintenance and support of the party system of government in this country is or is not opposed to the public welfare. Now, how can any Court pronounce adequately upon such a question as a question of public weal except as a matter of personal opinion with the soundness of which any other Court with equal justification or the reverse is entitled to disagree ? Such a question as a question of public policy is one upon which the Court should, in my judgment,

(1) [1892] A. C. 25, 45.

refuse to express any opinion at all. It is entirely beyond its province to have any opinion to express, nor could it condescend to express one, if it held it, without abandoning that duty of absolute political impartiality which public policy in the highest sense requires that the Court shall without a shadow of turning at all times and invariably observe. This is only another way of saying that a tendency to be subversive of the public good within the meaning of the rule now under consideration must be subversive of something in the body politic which every normally constituted citizen of goodwill must, of necessity, desire to preserve; and a condition which at its worst has a tendency to support the party system in all its developments cannot, in my judgment, be said to be subversive of the public good in that elementary sense, however damaging may be the criticism to which the system may, for all I know, be open.

It was also objected that the condition here was objectionable in this: that the form of the gift exposes the legatee, however meritorious his public service, to the risk of being passed over in the distribution of hereditary titles, so that it is thus calculated to chasten his patriotic zeal. This, however, I think, must be regarded merely as a fanciful criticism. It is sufficient to say there is a multitude of other distinctions still within his reach and not touched by the condition. The truth is that this branch of the law is not to be extended. Public policy at its highest requires that it should not. "Judges," as Cave J. said in the passage already cited, "are more to be trusted as interpreters of the law than as expounders of what is called public policy." The House of Lords in *Egerton* v. *Brownlow* (1), not perhaps, if one may venture to say so, then fully foreseeing the consequences, treated the question in a case, it must be recognized, of some aggravation, with an abandon which has not in later years been repeated. But even there it was said—e.g., by Lord Truro—that judges must be presumed to take care not to apply the law to doubtful cases.

This case at its highest is one of these. I can myself

(1) 4 H. L. C. 1.

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see no sufficient objection in point of law to the condition in this will. Its validity, in my judgment, ought to be affirmed.

Taking that view of the principal question I do not find it necessary to deal with Mr. Austen-Cartmell's second contention, that even if the condition imposed by clause 17 of the will is bad, the gift in clause 18 is an alternative gift, and the condition of that gift is not open to the same objection. In my judgment, that contention deserves serious consideration, but I am relieved from the duty of embarking upon it by the conclusion I have reached on the main point.

In my opinion this appeal should be dismissed.

Solicitors for appellants: *Sanderson, Adkin, Lee & Eddis.*
Solicitor for the Crown: *The Treasury Solicitor.*

G. A. S.

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In re EVANS.

PUBLIC TRUSTEE *v.* EVANS.

[1919. E. 84.]

Will—Conditional Legacy—"If he attempts to assign it or to become bankrupt"—Forfeiture—Receiving Order made against Legatee on Creditor's Petition at date of Will—Subsequent Adjudication in Bankruptcy—Devise by Codicil of Freeholds to Legatee "until he shall forfeit the same in case of bankruptcy"—Devisee an undischarged Bankrupt—Words of Futurity applied to past Event.

Testator, by his will dated December 21, 1911, devised and bequeathed his real and personal estate to his trustees upon trust to sell and convert with power to postpone, and proceeded as follows: "Out of my estate I desire my trustees to pay to my son H. an annuity of 156*l.* to be paid monthly, unless he attempts to assign it or to become bankrupt. In these events it shall be entirely optional with my trustees to pay him the said annuity, my wish and intention being that the money is to be for his personal use to keep him from want. If they think his conduct or circumstances deserves or requires it, I authorise them to increase the annuity to 260*l.* per annum, payable as and on the condition stated."

The testator then directed that the residue of the income of his estate should be paid to his wife during her life or widowhood, and that after her death or remarriage it should be applied for the maintenance of his daughter until she attained the age of twenty-five years, and that upon her attaining that age the whole of the residue of his property should be given to her.

By a codicil to his will, dated September 10, 1918, the testator devised two freehold farms to his son H. for the term of his life or "until he shall do some act to effectuate a sale or mortgage thereof or which shall forfeit the same in the case of bankruptcy," in either of which events the farms were to fall back into and form part of his residuary estate.

The testator died on September 13, 1918, leaving his widow, his daughter, and his son H. surviving.

On November 3, 1911, a receiving order had been made against H. on a creditor's petition, the act of bankruptcy being the failure to comply with a bankruptcy notice, and on November 24, 1911, he was adjudged bankrupt. The testator made his will and codicil with knowledge of these facts. On January 22, 1919, H. obtained his discharge, but his creditors had not been paid in full, and the bankruptcy had not been annulled.

On a summons taken out by the trustees for the determination of the questions (1.) whether the legacy given to H. by the will had become forfeited by his bankruptcy, and (2.) whether the freeholds devised to him by the codicil belonged to him or formed part of the residuary estate:—

Held, affirming the decision of Russell J.:

(1.) That the words "unless he attempts to become bankrupt" in the will must be read in their strict grammatical sense and as so read did not apply to a bankruptcy in invitum or bankruptcy generally, and therefore no forfeiture of the annuity had occurred on which the discretionary trust arose, and consequently that the annuity was payable to the trustee in H.'s bankruptcy.

(2.) That the words of devise in the codicil though phrased in words of futurity applied under the doctrine of *Trappes* v. *Meredith* (1871) L. R. 7 Ch. 248 to the past bankruptcy of H., and that there was no principle upon which the Court would be justified in holding that the doctrine was not applicable to legal estates, and consequently that the devised freeholds had ever since the death of the testator formed part of his residuary estate.

ORIGINATING SUMMONS.

S. Evans, by his will dated December 21, 1911, after appointing the Public Trustee and two others executors and trustees thereof and bequeathing certain specific and pecuniary legacies, proceeded as follows:—"I give devise and bequeath all my estate of whatsoever kind to my before-named trustees to sell and convert into money within such time after my death as they may think fit. They are to have full power to postpone

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any sale or conversion. Out of my estate and the proceeds thereof I desire my trustees to pay to my son Horace an annuity of 156*l.* to be paid monthly during his life unless he attempts to assign it or to become bankrupt. In these events it shall be entirely optional with my trustees to pay him the said annuity, my wish and intention being that the money is to be for his personal use to keep him from want. If they think his conduct or circumstances deserves or require it, I authorise them to increase the annuity to £260 per annum payable as and on the condition stated." The testator then directed that the residue of the income of his estate should be paid to his wife during her life or widowhood, and that after her death or re-marriage it should be applied for the maintenance of his daughter until she attained the age of twenty-five years, and that upon her attaining that age the whole of the residue of his property should be given to her.

By a codicil to his will dated September 10, 1918, the testator devised unto his son Horace two freehold farms for the term of his life or "until he shall do some act to effectuate a sale or mortgage thereof or which shall forfeit the same in case of bankruptcy," in either of which events they were to fall back into and form part of his residuary estate.

The testator died on September 13, 1918, leaving his widow, his daughter and his son Horace surviving.

On November 3, 1911, a few weeks before the date of the will, a receiving order had been made against Horace on a creditor's petition, the act of bankruptcy being the failure to comply with a bankruptcy notice. On November 15, 1911, the testator wrote to the official receiver enclosing a sum of 128*l.* 18*s.* 4*d.*, which in accordance with an arrangement between himself and his son he had accumulated and invested on the latter's behalf. On November 24, 1911, Horace was adjudged bankrupt. On January 22, 1919, he obtained his discharge, subject to his consenting to judgment for 5*l.* being entered against him. A dividend of 11*s.* 6½*d.* in the pound had been paid in the bankruptcy and there was still a sum of 2540*l.* unpaid.

On January 31, 1919, the trustees of the will took out an

originating summons for the determination (inter alia) of the following questions: (1.) Whether upon the true construction of the will and codicil and in the events which had happened the annuity of 156*l.* or any increased annuity by the will given to Horace (*a*) was payable to him or his trustee in bankruptcy, or (*b*) might be applied by the trustees for his benefit in such manner as they might think fit during the residue of his life, or (*c*) had failed and formed part of and was applicable as income of the testator's residuary estate; (2.) Whether upon the true construction of the codicil and in the events which had happened the rents and profits of the testator's two freehold farms belonged to Horace or to the trustee in bankruptcy during the life of Horace, or whether they now formed part of and ought to be held by the trustees upon the trusts declared of and concerning the testator's residuary estate.

The summons was heard before Russell J. on November 5, 6, 1919.

Sheldon for the trustees.

Gover K.C. and *Tyldesley Jones* for Horace.

Dighton Pollock for the testator's widow and daughter.

Clayton K.C. and *E. W. Hansell* for the trustee in bankruptcy of Horace.

Cur. adv. vult.

November 13, 1919. RUSSELL J. In this case two questions of construction under the testator's will and codicil arise for the decision of the Court: one relates to the provision of an annuity in favour of his son Horace, the other to a devise to him of two freehold farms. [His Lordship stated the facts and read the provisions of the will, and continued:] The question in reference to Horace's annuity is whether in the events which have happened (1.) it is payable to the trustee in bankruptcy as part of the bankrupt's property acquired before the discharge, (2.) it is payable at the option of the trustees to or for the benefit of Horace, or (3.) it never became payable at all or ceases to be payable so as to swell the amount available to answer the trusts of the residuary estate.

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I am asked to read the gift of the annuity as if the word "to" in the phrase "to become bankrupt" was inserted by mistake and to construe the will as though it ran either "unless he attempts to assign it or becomes bankrupt" or "unless he attempts to assign it or shall become bankrupt." In other words, I am asked to strike out that word "to" either with or without the substitution of the word "shall." If I am entitled to do this and act accordingly, then upon the authorities, although the events upon which the annuity is to cease or upon which its payment depends are in terms described as future events, the Court will treat the words as applicable to events which already had occurred at the date of the will even though their occurrence was known to the testator when he made his will. See *Trappes* v. *Meredith* (1); *Samuel* v. *Samuel* (2); *Metcalfe* v. *Metcalfe.* (3) The result of that would, in my opinion, be that the first trust in favour of Horace would not have become operative, and that subject to any exercise in the future by the trustees of their power to make an optional payment (which would confer no interest on the trustee in bankruptcy), the amount of the annuity would go to swell the residuary estate. I cannot accede to Mr. Clayton's contention that even in that case the trustee in bankruptcy would be entitled to the annuity as being a provision solely for the benefit of the bankrupt. This is not a case like *Green* v. *Spicer* (4) or *Younghusband* v. *Gisborne* (5), and the other cases cited where no one other than the insolvent is cestui que trust in respect of the fund. The trustees here in fact would have the choice between paying the amount of the annuity to Horace or paying to those entitled under the residuary gift, and the bankrupt would only acquire a title subsequent to the date of his discharge to such payments as the trustees chose to make in the exercise of their option.

It will thus be seen that the main question to determine is whether I am at liberty to read the will as if the words ran "unless he attempts to assign it or become

(1) L. R. 7 Ch. 248.
(2) (1879) 12 Ch. D. 152.
(3) [1891] 3 Ch. 1.
(4) (1830) 1 Russ. & My. 395.
(5) (1844) 1 Coll. 400.

bankrupt" or "unless he attempts to assign it or shall become bankrupt."

In considering this question I am not at liberty to make a will for the testator, but I must ascertain the expressed intention of the testator and I must accept the words used in their natural and grammatical meaning, even though this may lead to a disposition of an unusual character. If giving the words their natural and grammatical meaning produces some clear inconsistency in the will, then I am at liberty to depart from the natural and grammatical meaning and even to strike out words and supply words.

Mr. Jarman, in his work on Wills (6th ed., p. 578), has said: "Words are not to be expunged upon mere conjecture, nor unless actually irreconcilable with the context of the will, though the retention of them may produce rather an absurd consequence." Applying these principles which I believe to be correctly stated to the will before me, I find a sentence with a natural grammatical meaning, namely, unless he attempts to assign the annuity or attempts to become bankrupt. I cannot find that so read and so interpreted the provision produces any inconsistency with any other part of the will. It is true that upon this interpretation the case of a bankruptcy in invitum is not covered, but that fact, though pointing to a deficiency in the clause, does not produce inconsistency.

In the result I find myself unable to read the clause as applying to a bankruptcy in invitum or to bankruptcy generally. In this view the doctrine of *Trappes* v. *Meredith* (1) is of no assistance to the widow, the daughter or the son Horace because the bankruptcy which was in existence at the date of the will was founded upon a creditor's petition.

In answer to the first question I declare that upon the true construction of the will and in the events which have happened the annuity of 156*l.* for the life of Horace given by the will is payable to his trustee in bankruptcy.

The second question arises under the testator's codicil. By that document the testator made the following disposition:

(1) L. R. 7 Ch. 248.

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[His Lordship read the codicil, and continued :] That codicil gives those two farms by direct legal devise to Horace for life or until the happening of the events therein mentioned.

Now at the date of the will Horace had already committed an act of bankruptcy which would result, but for the terms of the codicil, in case of bankruptcy supervening (which it did) in his losing or forfeiting his life interest in the farms; and, under the doctrine of *Trappes* v. *Meredith* (1), the provisions of the codicil, though phrased in words of futurity, are to be applied to the past event. Mr. Clayton's contention upon this point was that the doctrine only applies to equitable estates and does not apply to legal estates. No reason was adduced for this alleged distinction nor does any suggest itself to me, but reliance was placed upon a passage in the judgment of Wood V.-C. in *White* v. *Chitty* (2), where, after reading the words in the clause there in question, he says : " Now, these words, certainly, so far as they go, would compel the Court to hold, as in the case before Vice-Chancellor Knight Bruce, and in the case before Vice-Chancellor Kindersley, that this bankruptcy, though having taken place anterior to the date of the will, is such a bankruptcy as, if it were continuing, would authorize the Court to declare that a forfeiture had taken place, supposing the estate to be an equitable one ; and consequently, in this case, to direct the executors to institute proceedings—although the words of futurity in this case are rather stronger than those which occurred in the cases referred to." I do not understand the Vice-Chancellor to decide or to suggest that legal estates are outside the doctrine. He is merely pointing out some years before *Trappes* v. *Meredith* (1) that in the two authorities cited by him the estates there in question were equitable. I can see no principle upon which I would be justified in holding that the doctrine of *Trappes* v. *Meredith* (1) is not applicable to legal estates.

Mr. Gover, I will not say argued, but submitted, that the son Horace was entitled to the two farms for his life but the submission quite properly was not seriously pressed upon me.

(1) L. R. 7 Ch. 248. (2) (1866) L. R. 1 Eq. 372, 375.

In answer to the second question I declare that the farms in question have ever since the testator's death formed part of the testator's residuary estate.

The costs of all parties as between solicitor and client will be retained and paid out of the residuary estate.

Horace appealed. There was also a cross-appeal by the trustee in bankruptcy. The appeal and cross-appeal were heard on April 20 and 21, 1920.

Gover K.C. and *J. G. Wood* for Horace. It is submitted that the words of the will "unless he attempts to assign it or to become bankrupt" ought not to be read in their literal sense, but that the words "to become bankrupt" should either be read "become bankrupt" (omitting the "to" altogether) or else should be read "should become" or "do become bankrupt." In that case the principle in *Trappes* v. *Meredith* (1) applies and there is a forfeiture of the life annuity. The testator has manifested a clear intention to make a provision for his son which would keep him from want. He cannot therefore have intended to make a provision which would have the effect of giving the annuity to the trustee in his son's bankruptcy. This view is supported by the fact that the testator with the knowledge at the time he made his codicil that his son had not obtained his discharge made no alteration in his will with regard to it. The general rule is thus stated in Hawkins on Wills, 2nd ed., p. 6, Prop. IV.: "The intention of the testator, which can be collected with reasonable certainty from the entire will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to fix the sense of ambiguous words, but to control the sense even of clear words, and to supply the place of express words, in cases of difficulty or ambiguity."

[YOUNGER L.J. referred to the statement in Theobald on

(1) L. R. 7 Ch. 248.

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Wills, 7th ed., p. 635, that "A gift over if the legatee should attempt to assign or charge his legacy takes effect, if the legatee executes a settlement purporting to assign it, although the assignment is by law inoperative."]

There are numerous cases in which the Court has departed from the natural meaning of the words used in wills, as, for example, *Hart* v. *Tulk* (1), where the Court read the words "fourth schedule" as "fifth schedule."

If the Court is against us on that point and holds that the annuity of 156*l.* is vested in the trustee in bankruptcy, then it is submitted that as the bankrupt has obtained his discharge the trustees are at liberty to exercise the option given them by the will and to pay him the additional 104*l.* a year.

Clayton K.C. and *E. W. Hansell* for the trustee in bankruptcy. We submit the following propositions:

1. The condition of defeazance in the will as properly construed applies only to a voluntary bankruptcy and not to a hostile bankruptcy by a creditor based on a positive and not a negative act of bankruptcy.

2. The condition relates to a future bankruptcy and not to a past bankruptcy of which the testator was aware when he made his will.

3. Assuming the forfeiture to have taken effect, there cannot be a trust created for the benefit of an adult person which is not subject to the law of bankruptcy. The trust is therefore bad and the result is that the property vests in the trustee.

The passage cited by Russell J. from Jarman on Wills, 6th ed., p. 578: "Words are not to be expunged upon mere conjecture, nor unless actually irreconcilable with the context of the will, though the retention of them may produce rather an absurd consequence" is applicable to the present case. The general principle on which the Courts ought to act in cases like the present is stated by Lord Cottenham in *Earl of Hardwicke* v. *Douglas* (2). The words "unless he attempts to assign it or to become bankrupt" are clear and unambiguous and a perfectly sensible meaning can be given to

(1) (1852) 2 D. M. & G. 300, 313. (2) (1840) 7 Cl. & F. 795, 815.

them as they stand, and the Court ought not to strike them out or alter them.

It is contended on behalf of the appellant that the Court ought to strike out the word " to " or substitute another word for it. If the testator had intended to leave out the word " to " it is not likely that he would have used two moods, the indicative and subjunctive. The testator was aware of the bankruptcy at the time he executed his will and may have thought that the debts in the existing bankruptcy would be discharged and the bankruptcy annulled and intended to warn his son against a possible future bankruptcy. The Court ought not to make the suggested alteration unless it is satisfied that by not doing so it would defeat the intentions of the testator. What the appellant is really asking the Court to do is to make a new will for the testator. Conditions as to bankruptcy are always strictly construed by the Court. Further, the clause applies to a voluntary and not to a hostile bankruptcy. A voluntary bankruptcy is where a debtor files his own petition, in which case the Court is bound to make a receiving order: Bankruptcy Act, 1914, s. 6, sub-s. 1. That is a case of attempting to become a bankrupt. *In re Betts* (1) is an instance of a case in which an attempt by a debtor to become bankrupt did not succeed. In Theobald on Wills, 7th ed., p. 633, it is stated that " Where property is given over upon alienation the term includes only voluntary alienation, and not a hostile bankruptcy," and for that proposition *Lear* v. *Leggett* (2); *Pym* v. *Lockyer* (3); *In re Harvey* (4) are cited. A person does not attempt to become a bankrupt when he is made one on a hostile petition. The distinction between a voluntary and hostile bankruptcy is pointed out in *In re Cotgrave.* (5) The word " attempt " here is only used by the testator for the purpose of emphasizing that the bankruptcy is to be on the legatee's own petition. The filing of a debtor's own petition is not the less an attempt because it is bound to be successful.

(1) [1901] 2 K. B. 39.
(2) (1830) 1 Russ. & My. 690.
(3) (1841) 12 Sim. 394.
(4) (1889) 6 Morr. 95.
(5) [1903] 2 Ch. 705.

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The declaration by the testator of his intention that his son should have the use and enjoyment of the property as opposed to the trustee is a repugnant condition and is inoperative to protect the property against his creditors: *Brandon* v. *Robinson* (1); *Graves* v. *Dolphin*. (2)

[YOUNGER L.J. referred to Williams on Bankruptcy, 11th ed., p. 234.]

Further, the trust under the will is to apply the annuity for the maintenance and support of Horace alone and the trustees have only a discretion as to the modes of application, but cannot deprive him of any part of it; it therefore passes to his trustee in bankruptcy: *Younghusband* v. *Gisborne*. (3) In that case it was held that a trust for the support and maintenance of an adult was a trust for his benefit generally and devolved upon his assigns under the Insolvent Act, notwithstanding a provision to the contrary in the will by which the trust was created.

Notwithstanding that the authorities have decided that "shall become bankrupt" applies to an existing bankruptcy, it would be going a step further to hold that the clause in the present case extends to a bankruptcy the existence of which the testator was aware of at the time he made his will. The words here are not "shall" but "attempts to" become bankrupt which are more indicative of futurity than "shall become."

As to the cross-appeal it is submitted that the words of the codicil "unless he shall do some act which shall forfeit the same in the case of bankruptcy" mean that the devisee must do some voluntary act to cause the forfeiture. Bankruptcy does not forfeit the property. A person does not forfeit his property on bankruptcy. It is applied in payment of his creditors.

[They also referred to *In re Chapman* (4); *Metcalfe* v. *Metcalfe*. (5)]

Dighton Pollock for the widow and daughter of the

(1) (1811) 1 Rose, 197, 199.
(2) (1826) 1 Sim. 66, 67.
(3) 1 Coll. 400.
(4) [1904] 1 Ch. 431; [1905] A. C. 106.
(5) [1891] 3 Ch. 1, 4, 6.

testator. I am concerned only with the question on the codicil.

[LORD STERNDALE M.R. We will not call upon you as to that.]

Sheldon for the trustees of the will.

J. G. Wood in reply. In striking out the word "to" or altering to "do" the Court will do no more violence to the language of the will than was done in *Trappes* v. *Meredith* (1), where the Court read in three words, or in *White* v. *Chitty*. (2)

Cur. adv. vult.

May 19. LORD STERNDALE M.R. This appeal from Russell J. really turns upon one of the clauses in the will of the testator. The will was a will written by the testator himself, and made in 1911. There was also a codicil made in 1918 three days before his death, to which I shall have to refer, but the important question arises upon the will. [His Lordship read the provisions of the will, and continued:] That will was made on December 21, 1911, and almost exactly a month before that date, namely, on November 24, 1911, the son, Horace, had been adjudged a bankrupt on a creditor's petition, the act of bankruptcy being failure to comply with a bankruptcy notice. That bankruptcy was known to the testator at the time he made his will, as is shown by a letter dated November 15, 1911, written by him to the trustee, in which he enclosed a sum of money which he had accumulated with his son's assent for his son's benefit. It is quite clear now that although the words of the condition upon which the annuity ceased to be payable are future, or contemplate future events, they apply to past events. That is plain from *Trappes* v. *Meredith* (1) and other cases to the same effect. Therefore if the bankruptcy was in existence at the date of the will and in other respects satisfied the condition, the annuity would cease to be payable, and the question is whether that is the case or not. I may say that the son obtained his discharge some months after the testator's death, but the bankruptcy

(1) L. R. 7 Ch. 248. (2) L. R. 1 Eq. 372.

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was not annulled, and therefore any property coming to the bankrupt by a title which accrued before his discharge would vest to the trustee in bankruptcy.

There can, I think, be no question as to the meaning of the words "to be paid monthly during his life unless he attempts to assign it or to become bankrupt" as they stand. They mean, unless he attempts to assign it or attempts to become bankrupt. If I were asked to say what I thought was the intention of the testator in this will, I should have no hesitation in saying that I think he meant that the annuity should not go for the benefit of any assignee whether the assignment was made by the son, or took effect by operation of law, as in the case of bankruptcy. I think that is what the testator meant, and that he intended that in either of those events the annuity should cease to be a sum of money to which the son was entitled as of right and should become a compassionate allowance to be made him at the discretion of the trustees of the will. But, unfortunately, I have to look not at what the testator meant to carry out, but what he has said in his will. You cannot have an assignment without an attempt to assign; you may have a bankruptcy without an attempt to become bankrupt. If an "attempt" to become bankrupt were nonsensical, and there could be no such thing, then it would be another matter, but it is not so; a meaning can be given to the words; and one obvious meaning is, he may file his own petition; and there may be other "attempts" to become bankrupt. Therefore I do not think we can discard the words "attempt to" on the ground that they are nonsensical. What we were asked to do was to strike out the word "to," and either to read the passage "unless he attempts to assign it, or becomes bankrupt," or to insert some such words as "shall become" bankrupt, or as was ingeniously suggested by one of the counsel for the appellant, substitute the word "do" for the word "to" before "become bankrupt." I am sorry I do not see my way to adopt any of those suggestions. I think Russell J. expressed the principles which we have to apply quite correctly when he said: "In considering this question I am not at liberty to make a will for

the testator, but I must ascertain the expressed intention of the testator and I must accept the words used in their natural and grammatical meaning even though this may lead to a disposition of an unusual character. If giving the words their natural and grammatical meaning produces some clear inconsistency in the will, then I am at liberty to depart from the natural and grammatical meaning and even to strike out words and supply words." Then after referring to a passage in Jarman on Wills, 6th ed., p. 578, he continued: "Applying these principles which I believe to be correctly stated to the will before me, I find a sentence with a natural grammatical meaning, namely, unless he attempts to assign the annuity or attempts to become bankrupt. I cannot find that so read and so interpreted the provision produces any inconsistency with any other part of the will. It is true that upon this interpretation the case of a bankruptcy in invitum is not covered, but that fact, though pointing to a deficiency in the clause, does not produce inconsistency." That, as I have said, is, in my opinion, quite a correct statement of the principles that we have to apply, and applying them to this case I cannot see my way to strike out the word "to." The testator had legal knowledge; he must have known the difference between attempting to become bankrupt and becoming bankrupt. What meaning he exactly attached in his own mind to attempting to become bankrupt I cannot say; but there is no question that he wrote the words, and I do not see my way to adopt any of the alterations suggested.

It is probable, though not necessarily the fact, that the will came under the testator's consideration when he made the codicil, because the codicil dealt with a further provision for the son. If it did, again it is noticeable that he did not alter the words in the will; but considering the codicil was only made some three days before his death, and that it was made not at the same place as the will, it is quite possible he did not see the will, and I therefore attach no importance to that point.

Then another argument was addressed to us, which was this: even if the word "attempts" must be read with the

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words "become bankrupt," the phrase must be so construed as to include a bankruptcy in invitum, and this Court on principle ought to say that as the testator made an attempt to assign a cause of forfeiture a fortiori an actual assignment would be a cause, and, therefore, by the same process of reasoning, if he made an attempt to become bankrupt such a cause he must have meant an actual bankruptcy to be so too.

It is said that this is shown to be his intention by the following words: "My wish and intention being that the money is to be for his personal use to keep him from want." I should like to adopt that reasoning, but I am sorry to say I do not see my way to do so. It seems to me exactly the same question as the other. It is in effect striking out the words "attempt to" become bankrupt; they are not struck out physically but mentally; they are allowed to stand physically in the will, but are wholly neglected, and no meaning given to them. I am sorry to say I cannot see my way to interfere with the judgment of Russell J. I think it was right, and that it would be a very dangerous thing for us to make a new will for the testator because we think that the one he has made does not carry out his intentions, and if we once embarked on a process of that kind we should get into great difficulties in trying to make wills what we think they ought to be and not what they are.

There is a cross-appeal that was not pressed, and the judgment of Russell J. must be affirmed.

WARRINGTON L.J. The question in this case is whether an annuity given by the testator to his son, Horace, took effect or not. If it did take effect it passed to his trustee in bankruptcy. If it did not take effect, then there was substituted for it a discretionary power in the trustees to apply a corresponding sum for the benefit of the son or not as the trustees should please.

The question is one purely of construction, and it turns upon the meaning to be given to a very few words in the testator's will. The will was made on December 21, 1911, and on November 24, 1911, the son had been adjudicated a

bankrupt upon a creditor's petition, the act of bankruptcy being non-compliance with a bankruptcy notice. Those, I think, are all the material facts.

Now the words are: "I desire my trustees to pay to my son, Horace, an annuity of 156*l.* to be paid monthly during his life unless he attempts to assign it or to become bankrupt." The rest of the clause I do not propose to read at present.

The first question obviously is, what is the grammatical meaning of those words, and is there a sensible interpretation to be given to them according to their grammatical meaning? Now I think it is quite plain that the grammatical meaning of the words is that the annuity is to be paid to him during his life, unless he attempts to assign it or attempts to become bankrupt. Now, have those words a sensible meaning? I think they have. Having regard to the conditions on which the annuity was given, the words "attempts to assign" are really equivalent to the words "execute an assignment," because it is by reason of the condition on which the property is given that an assignment is no assignment at all, but is an attempt to assign; in fact I do not see in the case of an assignment any other meaning which can be given to the words "attempts to assign." With regard to bankruptcy it is different; a person may attempt to become bankrupt and may not become bankrupt; but to attempt to become bankrupt seems to me to import the doing by the person in question of some act intended or calculated to result in bankruptcy, such, for example, as the presentation of his own petition, or the committing of an act of bankruptcy, which implies a volition on his part, such as absenting himself and so forth. As far as the grammatical meaning of the words is concerned, I think the annuity would cease if he attempted to become bankrupt even if that attempt did not result in bankruptcy.

If that grammatical meaning is the one to which effect is to be given, the son plainly neither before nor after the will did any such act as that which I think according to the true meaning of the words could be construed as an attempt to become bankrupt. He had already become bankrupt under

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a creditor's petition, and the act of bankruptcy was a non-compliance with the bankruptcy notice. So far there is no answer, it seems to me, to the case for the trustee, that no such event as that specified by the testator has happened, and that the annuity becomes payable in consequence of the bankruptcy to the trustee in bankruptcy.

But the will goes on in these terms: "In these events it shall be entirely optional with my trustees to pay him the said annuity, my wish and intention being that the money is to be for his personal use to keep him from want." Great reliance was naturally placed on those words expressing the testator's wish and intention, and it was on those words that the argument was rested that the previous part of the will must be read not according to its strict grammatical interpretation, but in some way which would give effect to that wish and intention by interpreting them as unless he become bankrupt, or unless he shall become bankrupt. Unless he become bankrupt would be sufficient, or do become bankrupt, or some interpretation which would either strike out or alter the word "to." Now, are we at liberty to give such a construction in this case? In *Earl of Hardwicke* v. *Douglas* (1) the Lord Chancellor, Lord Cottenham—it is true in a dissenting judgment, but I think that does not detract from the force of what I am about to read, as it clearly expresses the law—said this: "It is not, according to my impression of the rule upon which the Courts have acted, consistent with the principles of construction to set aside the effect of clear and unambiguous words because there is reason to suppose that they do not produce the effect which the testator intended they should produce. If there be any ambiguity, then of course it is the duty of all Courts to put that construction upon the words which seems best to carry the intention into effect; but if there be no ambiguity, however unfortunate it may be that the intention of the testator shall fail, there is no right in any Court of Justice to say those words shall not have their plain and unambiguous meaning." Now, it seems to me this is exactly a case to which those remarks apply.

(1) 7 Cl. & F. 795, 815.

The words have their plain and unambiguous meaning; apparently they do not carry out what appears to have been the desire of the testator; but if they do not do so it is because the testator has unfortunately used words which do not carry out that desire. If however those words are clear, it is not the function of the Court to give them another interpretation founded upon what it believes to have been the intention and desire of the testator. Whatever way the argument is put, it all results in this: that the Court is asked to construe those words in a sense which is not according to their unambiguous grammatical meaning, and that I think it is impossible for it to do. I confess I have arrived at this conclusion with considerable regret, because I think the testator has unfortunately used words which do not give effect to what he intended to be done and which he would not have used if his attention had been more directly drawn to them; but it seems to me that the safer course, and the one more in accordance with principles upon which wills have to be construed, is to do that which I think ought to be done rather than to strain the words of the testator so as to give them another meaning.

With regard to the cross-appeal I have nothing to add. I entirely agree with the judgment of Russell J. and the reasons given by him for it. The cross-appeal in my opinion fails, as does the principal appeal.

YOUNGER L.J. If the decision in this case depended entirely upon the meaning to be attributed to the words of this will according to their literal signification and standing alone, there could I think be no doubt that the direction by the testator to his trustees to pay to his son an annuity of 156*l.* by monthly instalments during his life has not at present determined by anything that has yet happened. The son, so far as appears, has not yet "attempted" to assign that annuity, nor yet has he "attempted" to become bankrupt.

Probably for this reason the main effort in argument on the part of the appellant's counsel was to show that the testator

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in the writing out of his will—which is holograph—made an obvious error in inserting the words "to become bankrupt," instead of the words "becomes" bankrupt or "become" bankrupt or "do become" bankrupt. And it is true that while conditions of defeazance on an annuitant's "attempt" to assign as well as on his "actually" assigning are to be found in the books, no instance is forthcoming in which the defeazance is to become operative on his attempting to become bankrupt as distinguished from his becoming bankrupt; nor is there any very obvious reason why such a distinction should be introduced. But this will is, evidently of purpose, informal and untechnical in its phraseology; it is framed without reference to precedents, so that little assistance can be derived from a comparison of its terms with them, and I agree with the other members of the Court and with the learned judge in thinking that there is no sound principle upon which the Court as a Court of construction can here either strike out or alter the words which the testator has actually used. Unless the appellant can succeed in his contention on these words of this will as they are, he must I think fail.

Now, as I have said, upon the literal construction of the words standing alone he cannot succeed. Neither of the events introducing the discretionary powers of the trustees has, so far as the evidence goes, yet occurred.

But the real difficulty of the case consists, as I think, in this, that this clause is one of a class in which the Courts by a series of decisions accepted as sound by the House of Lords, and in order to give effect to what is conceived to be a testator's manifest intention, have felt themselves at liberty to reject, at least in one very important respect, the literal construction of his words, and it must always be a serious question how far a liberal construction is in other directions permissible if such a construction be necessary to attain the same end.

In connection with such clauses the Courts have held, and it is now a definite rule of construction in regard to them, that a bankruptcy in existence at the date of a will and known to the testator is a bankruptcy within such a condition as we

have here, notwithstanding any words of futurity attached to it in the will. So certain is it in such a case that a testator does not intend to benefit the trustee, that the Courts have gone so far as to face an entire forfeiture of the interest of the beneficiary rather than bring about so unlikely a result. And that is the reason why we are bound, as I agree, by authority to hold in the present case that the son takes no interest under the codicil, although the result is to make its provision for the son determinable by an event which the testator knew had already occurred. And that was the difficulty which in *Trappes* v. *Meredith* (1)—the case to which the rule of construction now accepted is usually traced—led James V.-C. in the Court below to take a different view. True, he adopted a position which had the advantage under that will of bringing into operation a discretionary trust which the opposite view of the Lord Chancellor rendered nugatory, a consideration which would undoubtedly present itself with compelling force to the mind of that learned judge. But he said (2): "It would be perfectly idle for the testatrix as it seems to me to have made provision for her husband determinable by an event which she herself knew had occurred already. Then, on the other hand, it seems to me to be equally absurd to suppose that she intended to give this to the assignees under the Scotch bankruptcy. These are two intentions, either of which, as it appears to me, it is too unreasonable to impute to the testatrix." In the result, however, the latter absurdity was treated as the greater by the Lord Chancellor, and the effect of the rule then and since adopted is to defeat it even at the cost, as in the codicil here, of determining altogether the interest thereby given.

The effect, however, of the learned judge's decision in this case with reference to the annuity is the opposite: it is to benefit, at least up to the present, the trustee in bankruptcy, that "absurd" result to which Sir W. James refers and which the rule at least avoids, and that too when the alternative is not to forfeit the annuity but merely to introduce the executor's discretionary powers in relation to

(1) L. R. 7 Ch. 248. (2) (1870) L. R. 10 Eq. 604, 609.

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it. Is there any legitimate escape, short of an unauthorized alteration in the words of the will, from a result which the Courts have in these cases taken such pains to avoid ? That, I think, is the question with which we are here faced.

Now I can myself see only one possible way of legitimate escape. I will state later whether in the result I can permit myself to treat it as open. The testator here has expressed his actual intention with special distinctness. On "these events" happening—he clearly means on either event happening—"it shall," he says, "be entirely optional with my trustees to pay him," the son, "the said annuity, my wish and intention being that the money is to be for his personal use to keep him from want." Now in these words we may truly have the key to the whole clause. It is to give certain and unfailing effect to that wish and intention that the annuity, as a matter of direct bequest, is to be superseded by the discretionary trust even if the son attempt to assign although he does not succeed in doing so ; even if he attempt to become bankrupt although he does not become so.

It is not suggested that the use of this word "attempts" suffices to deprive an actual assignment or some kinds of bankruptcy, if existing at the death, of effect to determine the interest ; but it is said that a bankruptcy to have that effect must be a bankruptcy brought about by the debtor's own petition or otherwise by his active co-operation. In other words, the question is what on this will was the testator's purpose in making, so far as language was concerned, the attempt rather than the result the crucial test of defeazance. Was it to make the co-operation of the son in the position which brought about the defeazance an essential condition, or was it to make the defeazance operative on the mere appearance of danger that he would no longer, if the trustees did not intervene, have the annuity for his own use to keep him from want ? I cannot but think that the second was the testator's purpose.

The question it will be noted only arises so far as bankruptcy is concerned. An assignment, so far as co-operation of the assignor is concerned, stands on the same

footing as an attempt to assign. But bankruptcy does not, it is said, and said truly, necessarily include an attempt to become bankrupt, because bankruptcy may be and usually is brought about despite all attempts to avoid it. I agree, therefore, that no such bankruptcy has yet supervened. If the testator, in using the word "attempt" with regard both to "assignment" and "bankruptcy" must be taken to have used it because he intended the co-operation of his son in bringing about either the one or the other to be necessary in order that either change should be effective for the purpose of determining his interest. But I feel strongly, for the reason above given, that while that might be the only meaning properly attributable to the testator's words if they were not explained by his subsequently stated wish and intention, so explained they seem to me to be inserted from another point of view altogether, and therefore have not the effect of preventing us from saying that any kind of bankruptcy when it comes is like any assignment when it comes, effective to introduce the discretionary powers and so give effect to the testator's expressed intention.

For these reasons my own strong inclination unassisted by the opinions of my Lord, the Lord Justice and Russell J., would be in favour of treating any bankruptcy of the son as sufficient on this will to introduce the discretionary powers of the trustees. It seems to me that on this will the necessary step in construction, if it be a step at all, is a small one compared with that already taken by the Courts in such cases, and especially so in a will like this, where the intention of the testator is a matter of statement and not of inference. But I cannot, having regard to the views of my colleagues to the contrary, feel sufficient confidence in the correctness of my own view to justify any formal dissent on my part from the conclusion they have reached.

Accordingly I acquiesce in their decision that, on this point, the appeal should be dismissed.

On the question arising under the codicil I have nothing to add to the judgments already delivered. I entirely agree with them.

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Gover asked whether the trustees of the will would be entitled in their discretion to pay the additional legacy of 104*l.* to the son.

LORD STERNDALE M.R. I do not see there is anything to take away their discretion to increase the annuity. You may take liberty to apply on the question whether if they elect to do so the additional sum may properly be paid to the son and not to the trustee in bankruptcy.

Appeal and cross-appeal dismissed.

Solicitors for Horace: *John T. Lewis & Woods.*

Solicitors for trustee in bankruptcy: *Tarry, Sherlock & King.*

Solicitors for widow and daughter and trustees: *Charles Russell & Co.*

W. I. C.

EVE J. 1920 *May* 10, 11, 21.

FORGIONE *v.* LEWIS.

[1920. F. 43.]

Vendor and Purchaser—Specific Performance—Written Agreement—Variation—Evidence—Admissibility—Common Mistake.

In a written agreement for the sale and purchase of a leasehold house the number of the house was inaccurately described as No. 232 instead of 233. There was no dispute as to the identity of the house, which was admitted by the vendor to be No. 233. In an action by the purchaser against the vendor for the specific performance of the agreement to sell No. 233, the defence was raised that in such an action no parol variation of the written agreement could be made, according to the rule in *Woollam* v. *Hearn* (1802) 7 Ves. 211 applied in *May* v. *Platt* [1900] 1 Ch. 616. The Statute of Frauds was not pleaded by the defendant, and the plaintiff did not ask for rectification of the written agreement, or seek to introduce any parol evidence:—

Held, that as there was a common mistake of both parties to the agreement the rule in *Woollam* v. *Hearn* had no application, and the plaintiff was entitled to specific performance of the contract alleged.

ACTION WITH WITNESSES.

By an agreement dated August 5, 1919, signed by the

parties, the defendant, Edwin Lewis, agreed to sell to the plaintiff, Edoardo Forgione, a leasehold shop, messuage and premises known as No. 232, Cemetery Road, Trealaw, Rhondda, in the county of Glamorgan, for the remainder of a term of ninety-nine years, at the price of 500*l.*, the completion to take place on September 3, 1919, and vacant possession to be given to the purchaser on completion. By his statement of claim the plaintiff set out an agreement for the sale and purchase of No. 233 (in the said agreement described as No. 232), and claimed specific performance thereof, the defendant having wrongfully refused and neglected to perform the agreement on his part. The defences were a denial of the agreement as alleged in the statement of claim; that the plaintiff had been guilty of delay; and in the alternative, if the defendant entered into the agreement, before any breach thereof, it had been agreed between the plaintiff and the defendant that the agreement should be rescinded, and it had been rescinded accordingly. The defendant having considered the agreement as rescinded, sold the same house to another purchaser for 495*l.*

There was no dispute as to the identity of the house sold, and the defendant in his evidence admitted that the house No. 233 was the subject of the agreement. It was one of six leasehold houses held under one lease, at one entire rent and there was no provision in the contract for the apportionment of the rent.

H. B. Vaisey for the plaintiff. There was a mutual mistake in the written agreement as to the number of the house. It was stated in a letter by the defendant's solicitor to the plaintiff's solicitor that the correct number was 233, and that fact was admitted by the defendant in the witness box. The substantial defence is the alleged mutual abandonment of the contract, but that was not established by the correspondence. There was no rescission, either verbal or in writing.

Clayton K.C. and *Stanley Evans* for the defendant. There are various defences to this action. The two houses, 232 and 233, with four others, were held by the same person under one

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lease, and there was no contract for the apportionment of the rent, so specific performance cannot be decreed. There was also considerable delay, and the defendant rightly thought from a letter of the plaintiff's solicitor that the matter was at an end on the ground that the plaintiff could not get a licence to trade. The defendant then resold the house for 495*l.*, and it would be a hardship now to enforce specific performance of the first agreement. Lastly, there can be no variation by parol of a written agreement in an action for specific performance: *Woollam* v. *Hearn* (1); White and Tudor's Leading Cases in Equity, 8th ed., vol. ii., pp. 517, 525; *May* v. *Platt* (2), a decision by Farwell J.; and *Thompson* v. *Hickman*. (3) *Olley* v. *Fisher* (4) was a decision by North J. in conflict with *May* v. *Platt* (2), but the decision of Farwell J. is to be preferred.

H. B. Vaisey in reply. The real contract between the parties is not in dispute.

No. 232 was not the true subject-matter of the contract. There was a mistake made and corrected. No parol evidence is necessary here, and I do not ask for rectification. *Olley* v. *Fisher* (4) applies. The letters are sufficiently connected with the memorandum of the contract to be admitted: *Stokes* v. *Whicher*. (5)

Cur. adv. vult.

May 21. EVE J. (after stating the defences raised on the pleadings and holding that there was no substance in them, dealt with two other defences raised at the bar, which also afforded no defence to the action, and continued:) This brings me to the final defence. It was of this nature. There is no dispute as to the identity of the premises agreed to be sold, but in the written contract they are inaccurately described as No. 232 instead of No. 233. The contract pleaded is a contract to sell No. 233, inaccurately described as No. 232. This mistake was the common mistake of both parties, it was

(1) 7 Ves. 211.
(2) [1900] 1 Ch. 616.
(3) [1907] 1 Ch. 550.
(4) (1886) 34 Ch. D. 367.
(5) [1920] 1 Ch. 411.

pointed out by the purchaser's solicitor in a letter written before the abstract was delivered, and after making due inquiry the vendor's solicitors wrote to him on September 30 : " We have ascertained the correct number of the premises purchased by your client is No. 233." At the trial the plaintiff's counsel put in the contract, the execution by the defendant being no longer denied, and certain letters, and closed his case. For the defendant, who has not pleaded the Statute of Frauds as a defence, it was argued that to decree specific performance in these circumstances would be to disregard the rule established in *Woollam* v. *Hearn* (1) and applied by Farwell J. in *May* v. *Platt* (2), that a plaintiff cannot obtain specific performance of a written contract with a parol variation, or, in other words, that parol evidence is not admissible on behalf of a plaintiff in a specific performance action to rectify the contract.

There is some conflict of authority as to whether any such rule still obtains or whether, since the Judicature Act, the Court ought not in an action for rectification and specific performance where the Statute of Frauds has not been pleaded, or in which it is not by reason of part performance a bar, to admit parol evidence to rectify the written contract and then give consequential relief in the nature of specific performance on the footing of the contract as rectified as in *Olley* v. *Fisher* (3); and it was suggested that this case involved the determination of the question which line of authority ought to be followed. I do not so regard it. No rectification is in fact asked for, and no parol evidence is sought to be introduced. A contract to sell No. 233 is pleaded, and a common mistake in the reduction of the contract to writing is alleged. These allegations having been proved in the manner I have indicated, I do not think that the case is one to which the rule in *Woollam* v. *Hearn* (1) has any application, and in my opinion there is really no defence to the plaintiff's claim. Accordingly, I decree specific performance of the contract alleged ; the plaintiff having accepted the title the order will be framed

(1) 7 Ves. 211. (2) [1900] 1 Ch. 616.
(3) 34 Ch. D. 367.

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on that footing, and the defendant must pay the costs of the action.

Solicitors: *Hyman Isaacs, Lewis & Mills, for E. W. Pocock, Pentre; Simmons & Simmons, for D. Roberts Rosser & Davies, Pontypridd.*

G. M.

ASTBURY J. 1920 *June* 2, 3.

In re BATTIE-WRIGHTSON.

CECIL *v.* BATTIE-WRIGHTSON.

[1920. B. 1061.]

Will—Construction—Bequest of Balance in "said bank"—No Bank named in Probate—Right to look at Erasure in original Will—Testatrix with many Banks—Latent Ambiguity—Extrinsic Evidence.

A testatrix, who in fact had accounts at seven banks, bequeathed her balance at "the said bank" to a specific legatee. No bank was named in the probate:—

Held, that in order to ascertain what bank was intended the Court was entitled to look at the original will, in which a clause, immediately preceding the specific bequest and containing the name of the bank, had been formally erased for ulterior purposes, and that the erasure could be read for this purpose.

Manning v. *Purcell* (1855) 7 D. M. & G. 55; *Shea* v. *Boschetti* (1854) 18 Beav. 321; *Gann* v. *Gregory* (1854) 3 D. M. & G. 777; and *In re Harrison* (1885) 30 Ch. D. 390 applied.

Held, in the alternative, that this was a case of latent ambiguity giving rise to an equivocation so that the original will with its erasure was also admissible as direct evidence of the testatrix's intention.

Doe v. *Hiscocks* (1839) 5 M. & W. 363 applied.

ORIGINATING SUMMONS.

By her last will dated October 3, 1917, the testatrix after revoking all previous wills and appointing the plaintiffs and the defendant Battie-Wrightson her executors and trustees and giving certain annuities and legacies including a legacy of 6000*l.* to Annie Maria Middleton now the defendant A. M. Halliwell and declaring them free of duty proceeded:—

"I give the following legacies [to be paid out of the money

standing to my credit at the National Provincial Bank of England, Bishopsgate, E.C., and not out of any other monies, namely] to Mrs. Annie Stevens"—and six other legatees sums amounting to 125*l*. "And I declare that all the said legacies shall be paid free from legacy duty. I give to the said Annie Maria Middleton in addition to the legacy which I have already given to her the undisposed balance which may be to my credit at the said bank after paying thereout the legacies lastly hereinbefore mentioned. And also my shares in"—certain named companies—" in the hope and expectation (but without imposing upon her or creating any trust whatever) that she will thereout or out of the income thereof at her sole discretion maintain the boy named Walter Frederick Perkins who lives with us until he attains the age of 21 years or until such earlier date as the said Annie Maria Middleton shall in her sole and absolute discretion consider him to be self-supporting. And I declare that the receipt in writing of the said Annie Maria Middleton for the said balance and shares shall be a sufficient discharge to my executors and that they shall not be under any liability or responsibility whatever as to the application thereof by her."

After certain specific devises and bequests including a devise of the Wothorpe estate to Annie Maria Middleton the testatrix devised and bequeathed her residuary real and personal estate to her trustees upon trust for sale and conversion and to hold the proceeds (after payment of her funeral and testamentary expenses debts and legacies) in trust for the defendant, Battie-Wrightson absolutely.

On September 10, 1917, testatrix had instructed her solicitor to prepare a new will, and on October 3 he attended her with the above will in draft. By her direction he struck out the words in square brackets. Owing however to the state of her health the testatrix decided to execute the altered draft as her will without waiting for a fair copy or engrossment, and this was accordingly done, the above alteration being duly attested by the testatrix and the witnesses to the will.

The testatrix died on October 29, 1917, and her will was proved on September 11, 1918, the cancelled words being

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omitted from the probate which was engrossed clean so as to read without any blank: "I give the following legacies to Mrs. Annie Stevens" and others as above stated.

As no bank was mentioned in the probate, the question arose whether any and what balance passed to the specific legatee Annie Maria Halliwell under the above bequest. On March 31, 1920, the plaintiffs issued this summons to determine the point.

The evidence showed that the testatrix had accounts at seven banks. At the National Provincial Bank she had a balance of 1977*l.* at the date of her will and 1982*l.* at her death. At two other banks she had large balances, at three banks moderate balances, and at the remaining bank a 200*l.* overdraft.

The question was whether the "said bank" could be identified by reference to the original will which was produced from Somerset House.

Philip Stokes for the plaintiffs.

Hildyard K.C. and *H. B. Vaisey* for the residuary legatee. The original will can be looked at for purposes of punctuation, capital letters, etc., in the part admitted to probate, but the probate is conclusive as to the actual words of the will as a testamentary instrument: *Oppenheim* v. *Henry*. (1) If an erasure does not appear on the probate it forms no part of the proved will and cannot therefore be used to construe it.

Even if the original will is looked at, it merely shows that the testatrix excluded the National Provincial Bank and then omitted to define what other bank she intended. That is void for uncertainty.

Luxmoore K.C. and *Roope Reeve* for the specific legatee. The stricter course would have been for the executors to have applied for a facsimile probate, so that the erasures would have appeared thereon. This was done in *Shea* v. *Boschetti* (2) and *Gann* v. *Gregory*. (3) In that case the Court could clearly look at the erasures as part of the proved will. But whether this is done or not the Court can always look

(1) (1853) 9 Hare, 802n. (2) 18 Beav. 321, 325.
(3) 3 D. M. & G. 777, 780.

at the original will including the erasures : *Shea* v. *Boschetti* (1) ; *Manning* v. *Purcell* (2) ; *In re Harrison* (3) ; Hawkins on Wills, 2nd ed., pp. 11–13 ; Williams on Executors, 10th ed., pp. 445–447.

The doubt formerly expressed in *Gann* v. *Gregory* (4) and by Sir E. V. Williams in the earlier editions of his book is no longer law.

If the original will is looked at the case is clear. With the obvious intention of benefiting the specific legatee the testatrix erased the words charging the 125*l.* legacies on the particular bank balance, but by inadvertence she omitted to strike out the words " after paying thereout the legacies hereinbefore mentioned." The bank balance is still therefore subject to those legacies but the identity of the said bank is manifest.

Suppose however that the Court has no inherent right to look at the original will. On the face of the probate the word " said " is an obvious inaccuracy, and the balance at the testatrix's bank would pass. But on inquiry seven banks are found to all of which the inaccurate description is equally applicable, though the testatrix obviously only meant a particular bank. That is a latent ambiguity, and as it raises a clear case of equivocation direct evidence of intention is admissible : Hawkins on Wills, 2nd ed., p. 14 ; Wigram on Extrinsic Evidence, 5th ed., p. 110, prop. 7 ; *Miller* v. *Travers* (5) ; *Doe* v. *Hiscocks* (6) ; *Doe* v. *Needs.* (7) The original will can be put in evidence under this rule and the same result follows.

Hildyard K.C. in reply. The ambiguity, if any, is patent on the face of the probate and extrinsic evidence of intention is inadmissible. As to the right of the Court to look at the original will, there are no doubt many authorities, but in none of them have the erasures actually been used to construe the unerased portion admitted to probate.

(1) 18 Beav. 321, 325.
(2) 7 D. M. & G. 55, 61, 65.
(3) 30 Ch. D. 390, 393, 394.
(4) 3 D. M. & G. 777, 780.
(5) (1832) 8 Bing. 244, 247.
(6) 5 M. & W. 363, 368 ; Tudor's Real Property Cases, 4th ed., pp. 489, 493.
(7) (1836) 2 M. & W. 129.

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ASTBURY J. (after stating the facts). The question turns on two rules of construction, first, whether I can look at the original will and take into account the contents of the erased portion in order to ascertain the bank indicated as "the said bank," or, secondly, whether extrinsic evidence may be regarded for this purpose.

At the date of her will and death the testatrix had seven different banking accounts; at those dates respectively she had standing to her credit at the National Provincial Bank, 1977*l.* and 1982*l.* Her other banking accounts, except one, were in credit at both dates.

Whatever be the right construction to be placed upon this altered document, it is clear that an application can, if necessary, be made to the Probate Division to rectify the present probate by admitting to probate a facsimile copy of the original will showing the erased matter; and anything that I determine in this case must be without prejudice to the right of any party to make this application.

On the first question, whether the Court on a matter of construction can look at the original document and take into account the character of the erased portion, there are many authorities, with some of which I propose to deal. But I will first refer to the text-books.

In Jarman on Wills, 6th ed., p. 44, the author says: "To determine the construction, the original will, both of real and personal property, may be looked at. It was said, indeed, by Sir W. Grant, in *Sanford* v. *Raikes* (1), that his decision on the construction of the will before him could not depend on the grammatical skill of the writer, in the position of the characters expressive of a parenthesis: that it was from the words and from the context, not from the punctuation, that the sense must be collected. And there are, probably, few imaginable cases in which punctuation could exercise a very important influence upon the construction. But in recent times the Courts have without hesitation adopted the practice of examining original wills with a view to seeing whether anything there appearing—as, for instance, the mode in

(1) (1816) 1 Mer. 646, 651.

which it was written, how ' dashed and stopped,'—could guide them in the true construction to be put upon it."

In Hawkins on Wills, 2nd ed., pp. 11–13, the following appears: "Mr. Hawkins observes: 'Notwithstanding a dictum of Sir W. Grant in *Sanford* v. *Raikes* (1), it appears to be settled, that in construing a will marks of punctuation, as parentheses, stops, capital letters, etc., may be taken into consideration. . . . . In *Compton* v. *Bloxham* (2) Knight Bruce V.-C. sent for and examined the original will, and decided on the ground that the words "my monies" began an entirely new sentence. It would seem that marks of punctuation, as stops, capital letters, etc., in the original will may be adverted to, though not in the probate, and though the question relates to personal estate: *Oppenheim* v. *Henry*. (3) But the probate is conclusive as to what the words of the will are. In *Manning* v. *Purcell* (4), where the will, one of personalty, was a common printed form filled up by the testator, with parts of the form struck out, the original will was sent for, and Turner L.J., in giving judgment, said: 'In coming to this conclusion, I have not overlooked the effect to be given to the erasures, as they appear on the original will. In *Child* v. *Elsworth* (5) . . . . Cranworth L.J. . . . . said: 'It is only necessary to add, that we have caused the original will to be examined, and it appears that the whole gift in question to the children and grandchildren of W. D., including the direction for the time of payment, is written continuously as one sentence, and is closed with a full stop.'" Lastly, *In re Harrison* (6) is referred to, where Lord Esher said: "I know of no rule that for the purpose of construing a will you may not look at the original will itself."

In Williams on Executors, 10th ed., pp. 445–448, the earlier authorities are examined, including *Shea* v. *Boschetti* (7), which I will presently refer to, and it is mentioned that in former editions of the work Sir Edward Vaughan Williams doubted whether in strictness the Court of Chancery had not

(1) 1 Mer. 646, 651.
(2) (1845) 2 Coll. 201.
(3) 9 Hare, 802n.
(4) 7 D. M. & G. 55.
(5) (1852) 2 D. M. & G. 679, 683.
(6) 30 Ch. D. 390, 393.
(7) 18 Beav. 321.

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gone beyond its legitimate means for construing wills of personalty where it had sought aid from appearances in the will itself not to be found in the probate. After referring to that passage the present authors say: "But the practice would seem to be to look at the original in such cases. The principle to be derived from the cases would appear to be that the original will may be looked at to assist the construction, but not to alter or vary or displace anything determined in the granting of the probate; and that if it is sought to do this, application must be made to the Probate Division to rectify the probate."

In *Manning* v. *Purcell* (1) the will was written by the testator filling up the blanks in a printed form and making various erasures. In the document as executed the testator gave devised and bequeathed to his wife all his moneys, furniture, plate, books, linen, wearing apparel, etc. The next sentence in the printed form began: "And as to all the rest residue and remainder of my estate and effects." The testator struck out the words "as to" and the word "rest," leaving the sentence to read—"And all the residue and remainder of my estate and effects. . . . . I give devise and bequeath the same unto my dear wife during the term of her natural life." The question was whether, having struck out the words "as to," so that the portion of the will following the gift of furniture and wearing apparel read all as one sentence, the wife's interest in the furniture and wearing apparel was cut down to a like estate, or whether she took the furniture absolutely and a life interest only in the residue. Knight Bruce L.J. referring to the view of Turner L.J., then absent from the Court, to the effect that the wife took the furniture absolutely, said (2): "He is of opinion, that the Vice-Chancellor's interpretation of the will is in this respect correct, thinking that a sufficiently strong inference to the contrary is not to be drawn from the erasure of the words 'as to,' especially when compared with other erasures." At a later stage of the case Turner L.J. himself said (3):

(1) 7 D. M. & G. 55. (2) 7 D. M. & G. 61.
(3) 7 D. M. & G. 65.

"I will only add to the observations which have been already made this remark with reference to the erasure of the words 'as to,' namely, that there are other words also struck out by the testator from the printed form in a way which shows that no reliance can be placed upon the erasures as having been deliberately and advisedly made with a view to alter the construction to be put upon the will. In coming to a conclusion upon this question, I have not overlooked the effect to be given to the erasures as they appear on the original will."

Now it is quite true that neither in that case nor apparently in any other reported authority were erased words used as an effective portion of the will in the sense of allowing them to give a different operation to other portions of the documents than would have otherwise been the case. But I think it is quite clear from Turner L.J.'s expressions that he was of opinion that if the erasure in the case before him had been sufficiently explicit he would have given effect to it on the construction of the clause following it.

In *Shea* v. *Boschetti* (1), the probate of a will originally granted without showing erasures was revoked and a new probate issued showing them. Romilly M.R. said (2): "In my opinion, the fact of the Court of Probate granting a facsimile probate does not, in the slightest degree, affect the rules of construction, or the manner in which this Court must deal with the case presented to it. The probate of the will performs its function by telling the Court what the will consists of; but whether the Court of Probate grants a facsimile probate or not, I apprehend this Court is bound to look at anything in the original will itself, which may aid and assist it in coming to a correct conclusion, as to the construction to be put upon the contents of the will." That means, if it means anything, that the erasures may be considered for the purpose of putting the true construction upon what would otherwise be a doubtful passage in a portion of the will that was admitted to probate.

In *Gann* v. *Gregory* (3) certain legacies originally written

(1) 18 Beav. 321. (2) 18 Beav. 325. (3) 3 D. M. & G. 777, 780.

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balance in her mind, especially when evidence has been admitted that she had more than one balance standing to her credit. The particular extrinsic evidence which is necessary and sufficient in this case is the original will. That is admissible under the extrinsic evidence rule as well as under the general rule I have already dealt with. Evidence to show the actual testamentary intentions of a testator is admissible only in exceptional cases, one of which is to determine which of several persons or things was intended under an equivocal description: Hawkins on Wills, 2nd ed., p. 14; Wigram on Extrinsic Evidence, 5th ed., p. 110, prop. 7. In *Doe* v. *Hiscocks* (1) Lord Abinger said: "Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express."

The residuary legatee contends that this is a patent and not a latent ambiguity, but I am unable to take that view. It is reasonably plain that the testatrix was pointedly referring to a particular fund, and the ambiguity is latent in that there is more than one bank to which she may have been intending to refer. This ambiguity may be cleared up by looking at the original to see what the antecedent was in the document which she in fact signed. For these reasons the question must be answered in the manner I have indicated.

Solicitors: *Foyer, White, Borrett & Black; Routh, Stacey & Castle, for Stapleton & Son, Stamford.*

(1) 5 M. & W. 363, 368; Tudor's Real Property Cases, 4th ed., pp. 489, 493.

G. R. A.

In re OLYMPIC FIRE AND GENERAL REINSURANCE COMPANY, LIMITED.

C. A. 1920 *June* 2, 3.

POLE'S CASE.

[1920. O. 8.]

Company—Underwriting Contract—Sub-underwriting Contract—Authority to apply for Shares—Authority coupled with an Interest—Irrevocable Authority—Withdrawal before Notice of Allotment—Rectification of Register of Shareholders—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, c. 69), s. 32.

By an underwriting contract dated December 3, 1919, a syndicate agreed with a company in consideration of a commission to subscribe for 150,000 of 350,000 shares to be offered to the public by a prospectus then about to be issued, and all allotments to the public were to be applied in relief of the syndicate's obligation to take up the 150,000 shares.

By a sub-underwriting letter the appellant agreed with the syndicate to subscribe 10,000 of the 150,000 shares underwritten by them and stated: "We now hand you application for the shares hereby underwritten by us together with cheque of 1250*l.*, being deposit of 2*s.* 6*d.* per share." The letter also provided that the appellant was only to be allotted and pay for so many of the 10,000 shares as should be his due proportion of the shares not taken up by the public, and that he was to receive a commission on the shares sub-underwritten by him. The letter also contained this clause: "This contract and our said application shall, notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form, be sufficient to authorise and empower the directors to allot to us the above-mentioned shares and enter our name in the register of members in respect thereof." The appellant did not in fact sign or hand to the syndicate any written application to the company for the 10,000 shares as contemplated by the sub-underwriting letter, but he handed to the syndicate the letter together with his cheque for 1250*l.* in their favour. On the issue of the prospectus only 55,000 shares were applied for by the public. On December 12 the syndicate verbally applied in their own name and in the names of several sub-underwriters (including the appellant) for an allotment of the total amount of the shares which they were bound to take up and paid with their own cheque for the total amount of the application money. On the same day the company allotted to the appellant 6334, being his proportion of the 10,000 shares under his sub-underwriting letter. On December 22 the appellant wrote to the company withdrawing his application for shares (meaning his sub-underwriting letter), but on December 29 the company sent him the

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usual formal notice of the allotment to him of 6334 shares. On motion by the appellant to rectify the register by removing his name therefrom as the holder of the 6334 shares :—

Held, that the authority given by the appellant to the syndicate to apply for shares was a continuing and irrevocable authority coupled with an interest which he was not entitled to withdraw.

Carmichael's Case [1896] 2 Ch. 643 applied.

Decision of P. O. Lawrence J. [1920] 1 Ch. 582 affirmed.

APPEAL from the decision of P. O. Lawrence J. (1) refusing to accede to an application made by the appellant for the rectification of the register of the company's shareholders, by striking out his name as the holder of 6334 shares, on the ground that his name had been entered therein without sufficient cause.

The facts are fully stated in the report of the case in the Court below, and they also sufficiently appear from the judgment of the Master of the Rolls.

Owen Thompson K.C. and *C. A. Bennett* for the appellant repeated the arguments used by them in the Court below.

Ward Coldridge K.C. and *J. F. Carr* for the company were not called upon to argue.

LORD STERNDALE M.R. I think this appeal fails, and that the judgment of P. O. Lawrence J. is quite right. The matter arises in respect of the issue and underwriting of shares in a company called the Olympic Fire and General Reinsurance Co., Ld. The company were issuing 350,000 shares, and as to 150,000 of those shares there was an underwriting agreement with a company called the Angel Court Trust, Ld., which in this judgment I will call the Trust. That agreement was the usual underwriting agreement by which the Trust bound themselves to take the 150,000 shares unless the public came in and took up a certain number of the shares. If the public took up a certain number of the shares then the 150,000 shares which the Trust underwrote and agreed to take would be reduced pro rata. As usual, the Trust, in order to carry this out, made a sub-underwriting agreement with the appellant. I understand that there were also other sub-

(1) [1920] 1 Ch. 582.

underwriting agreements. That sub-underwriting agreement was contained in what is called a sub-underwriting letter, which says: "For the consideration below stated we agree to subscribe at par or procure responsible subscribers to your satisfaction for 10,000 shares of 1*l.* each, being part of the shares which are to be offered for subscription, and to pay for the same in the manner and on the conditions and subject to the terms to be named in the prospectus to be filed with the Registrar of Joint Stock Companies prior to the same being issued to the public under the above title or any modification thereof. We agree to be bound by the terms of such prospectus notwithstanding any variation between the same and any draft or proof copy thereof produced to us on or prior to our making this contract. We now hand you application for the shares hereby underwritten by us, together with cheque for 1250*l.*, being deposit of 2*s.* 6*d.* per share payable on such shares." Then there is a provision reducing their 10,000 shares in the same circumstances as the 150,000 shares of the Trust were reduced—namely, in the event of the public taking up a certain quantity, and then they were to get a commission of 3 per cent. in cash. Then follows this clause: "5. This contract and our said application shall be irrevocable on our part, and this contract shall notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said Application Form, be sufficient to authorise and empower the Directors to allot to us the above mentioned shares and enter our name on the Register of Members in respect thereof." As a matter of fact although the letter states, "We now hand you application," no such application was handed. What was done was that the appellant handed to the Trust his cheque for the amount mentioned—namely, 1250*l.*—which the Trust forwarded to the company together with the sub-underwriting letter signed by the appellant. That was done, as the learned judge has found, with the approval and authority of the appellant, and I think he was right in that finding. What the appellant did was, that instead of handing in the application form he put the sub-underwriting letter and cheque

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into the hands of the Trust and said to them in effect: "Use this cheque and this sub-underwriting letter for the purpose of carrying out the terms of the letter and of the agreement which I have made with you." What happened was that on December 16, the public having come in to a certain extent, not 10,000 but 6334 shares were allotted to the appellant at a meeting of the company's directors. There were present at that meeting at any rate four directors of the Trust, and therefore the Trust had ample notice of the allotment of the shares. In my opinion that is enough to dispose of the case, but as it was not disposed of in the Court below on that ground I do not propose to make that the ground of my judgment. I say that for this reason, that although no express authority was given to the Trust to receive notice of allotment on behalf of the appellant yet in my opinion that was included in the authority that was given by the appellant to the Trust when, instead of making his application in the ordinary form, he handed this cheque and the sub-underwriting letter to them with, as I have said, in my opinion, an authority which in effect was: "Use these two documents—this sub-writing letter and this cheque—for the purpose of carrying out the irrevocable agreement which I have made with you for the purpose of relieving you to a certain extent from the obligations under your underwriting agreement." In my opinion that constituted an authority to receive on his behalf notice of the allotment. As a matter of fact formal notice of the allotment was not received by him until December 29. What was the cause of the delay I do not know. It may very well be that in the meantime the directors of the company were trying to get in some more of the public, and so relieve the underwriters and the sub-underwriters from their obligations. Before December 29 the appellant wrote a letter withdrawing his application, and withdrawing any authority on behalf of the Trust to make the application. The letter was in these terms: "As Solicitors for Mr. A. R. Pole we hereby give you Notice that he withdraws his application of the 2nd Dec. to your Company for 10,000 shares therein and that you are not to proceed to

allotment to him of any shares whether under that application or otherwise. We are instructed to request you to return 1250*l.* paid by Mr. Pole." That was, of course, an intimation to the effect that the authority given to the Trust was withdrawn. I do not think that any express withdrawal of the authority was communicated to the Trust. Mr. Pole did that, not on the ground or for the reasons that have been urged before us, but he founded the application he subsequently made to remove his name from the register on the ground of a certain misrepresentation with regard to the position of a Mr. White. That ground had so little substance in it that according to the learned judge's judgment it was withdrawn very early in the case before him, and it has not been relied upon before us. Any merits, therefore, that there might be in this application have gone. Having failed on the original ground of his application Mr. Pole, as he was perfectly entitled to do, said: "That does not matter. Legally whether I was misled or not as to Mr. White there was no contract between me and the company for these shares, and therefore I cannot be put upon the register. I withdrew my application before the allotment was communicated, and if I have committed any breach of contract at all it is one with which you the company have nothing to do; it is a matter to be settled between myself and the Trust. I may have committed a breach of contract so far as they are concerned. That does not justify you, the company, in allotting me the shares."

On the evidence before us there was not only a clear breach of contract with the Trust, but it seems to me there was a very considerable and grave breach of faith. I do not wish to say anything about that for this reason. Very often in these cases there are matters behind which do not really legally bear upon the question before the Court but which may and often do influence the motives of the parties in their action, and therefore I do not wish to say anything about that. The question we have to decide is simply a question of law. Is the appellant entitled to withdraw his application and authority to the Trust? In my opinion he is not. I have

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already said that in my opinion what he did with regard to the Trust resulted in this, that he authorized them to do what was necessary by means of his sub-underwriting letter and his cheque to carry out his agreement with them. That to my mind gave the Trust just as much authority as that which was given to the underwriter Mr. Phillips in *Carmichael's Case* (1) by Carmichael the appellant there. If that be so it is quite clear that the authority given to the Trust was an authority coupled with an interest: an irrevocable authority. When the appellant purported to withdraw that authority by giving notice to the company he had no more right to do it than if he had given notice to the Trust that he withdrew the authority. He could no more do it indirectly than he could directly, and I think that the learned judge took a perfectly proper view of the matter in three passages which I have noted in his judgment. He finds the facts as I think they ought to be found, and then he says (2): "In these circumstances I am clearly of opinion that the authority thus given was a continuing authority which could not be revoked by Mr. Pole, and further that Mr. Pole was not entitled to interfere with the Trust's exercise of such authority by withdrawing any application made by the Trust under such authority any more than he would have been entitled to withdraw his own application had he signed and handed such an application to the Trust as contemplated by the sub-underwriting contract." In another passage, after alluding to the argument that it was a matter entirely between the Trust and the appellant, and that the company had nothing to do with it, he says: (3) "I think that it is at least doubtful whether in the circumstances of this case the Trust could if they had been so minded have rendered the withdrawal effectual as against the company by electing to recognise it as valid and trusting to their remedy in damages against Mr. Pole." As to that I offer no opinion. Then he says: "But even if the Trust could have adopted that course I am of opinion that it was not the only course open to them.

(1) [1896] 2 Ch. 643. (2) [1920] 1 Ch. 594.
(3) [1920] 1 Ch. 595.

In my judgment the Trust could, as they did in fact, elect to hold Mr. Pole to his bargain and treat, and insist on the company treating, the withdrawal as wholly inoperative and void. The company knew of the sub-underwriting contract which was lodged with them at the time of making the application for the shares and they also knew that the purported withdrawal by Mr. Pole of the application was not authorized or recognized by the Trust." In a passage on a previous page (1) he says: "In my opinion such authority"—that is the authority conferred by Mr. Pole upon the Trust—"extended not only to the making of the application but also to the maintenance of the application when made as an effectual application down to the date of its final acceptance by the company." That is a perfectly right finding of fact, and Mr. Pole, therefore, in my opinion, was not right in withdrawing the application that had been made for him by the Trust, and the shares were perfectly properly allotted to him. I am not at all sure that when the Trust, acting on his authority, handed on the sub-underwriting letter and the cheque to the company, and the company, as I think they did by not rejecting it, accepted it, and thereby undertook to allot to Mr. Pole not the 10,000 shares which he had applied for but that 10,000 reduced in proportion as the shares were taken up by the public, there was not a direct relation created between Mr. Pole and the company, just as if his underwriting agreement had been made with them, but I do not rest my judgment upon that. I do not think it is necessary to do so.

For the reasons which I have given I think that this appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The appeal is from an order of P. O. Lawrence J., refusing to accede to an application made by Mr. Pole for the rectification of the company's register of shareholders by striking out his name in respect of 6334 shares on the ground that his name was entered without sufficient cause. I need not restate the facts

(1) [1920] 1 Ch. 593.

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which have been stated by the Master of the Rolls. It is enough to say that Mr. Pole signed what is commonly known as a sub-underwriting letter. That letter contains a clause providing that the contract and the application therein referred to "shall be irrevocable on our part, and that this contract shall notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form, be sufficient to authorise and empower the Directors to allot to us the above-mentioned shares and enter our name on the Register of Members in respect thereof." In the face of that it is quite obvious that Mr. Pole has a somewhat difficult task before him when he seeks to establish that his name was entered on the register without sufficient cause. He has elected to rest his case upon the ground that there was no binding agreement between him and the company in pursuance of which the company was entitled to enter his name upon the register of shareholders. That is the point, and it is a mere question of law which we have to determine. In my opinion the learned judge has correctly stated the conclusion at which we ought to arrive in the passage of the report (1) which has already been read by the Master of the Rolls. I think it is quite clear that the authority conferred by the sub-underwriting letter was an authority coupled with an interest in the person to whom it was given, for this reason, that it was given to the Angel Court Trust who had contracted to underwrite 150,000 shares, and the sub-underwriting letter if carried into effect would relieve the Trust, the principal underwriters, of their liability to the extent of the liability incurred by Mr. Pole. I think it was plainly an authority coupled with an interest. As such, quite independently of the clause in the contract which I have already read, the contract would be irrevocable. Now what is the effect of that authority being so irrevocable ? I think the effect is expressed in *Carmichael's Case* (2), which is to my mind indistinguishable from the present case. I think the effect is well expressed by the learned judge in the passage (1) to which I have already alluded.

(1) [1920] 1 Ch. 594. (2) [1896] 2 Ch. 643.

There is another point. The appellant's case depends upon his having, as he says, withdrawn his application before the allotment in pursuance of it had been communicated to him. Of course in the ordinary case where a man applies for shares in a company that is a mere proposal, and that proposal like every other may be withdrawn before its acceptance is communicated, but in my judgment it is established here that the allotment, that is to say, the acceptance of the proposal, was communicated not to Mr. Pole personally but to the Trust, his agents, at the time it was made. The minutes of the meeting at which the allotment was made are in evidence, and from them it appears that a Mr. Young and a Mr. Hobday, both directors of the Trust, one of them also a director of the company, were present at the meeting at which the allotment was made. I think, further, that it is plain upon this letter that the authority conferred upon the Trust extended to authorize them to accept the communication of an allotment made in pursuance of the underwriting letter. That is a ground which was apparently not taken before P. O. Lawrence J., and which is not included in the judgment. Whether the case is rested upon that or whether it is rested upon the irrevocability of the authority conferred upon the Trust and the extension of that authority not only to the making of the application but to the maintaining of the application, it seems to me that the application by the appellant to have his name struck off the register as having been inserted therein without sufficient cause must fail, and this appeal ought to be dismissed with costs.

YOUNGER L.J. I am of the same opinion. This is a sub-underwriting contract, but on the facts of the case, and in view of the terms of the sub-underwriting agreement, the position as between the appellant sub-underwriter and the company was not, after allotment of shares made to him, materially different, as I think, from the position all through in respect of the shares sub-underwritten of the principal underwriters, the Trust, towards the company. In the case

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which have been stated by the Master of the Rolls. It is enough to say that Mr. Pole signed what is commonly known as a sub-underwriting letter. That letter contains a clause providing that the contract and the application therein referred to "shall be irrevocable on our part, and that this contract shall notwithstanding any withdrawal on our part and/or any repudiation of our responsibility hereunder, or under the said application form, be sufficient to authorise and empower the Directors to allot to us the above-mentioned shares and enter our name on the Register of Members in respect thereof." In the face of that it is quite obvious that Mr. Pole has a somewhat difficult task before him when he seeks to establish that his name was entered on the register without sufficient cause. He has elected to rest his case upon the ground that there was no binding agreement between him and the company in pursuance of which the company was entitled to enter his name upon the register of shareholders. That is the point, and it is a mere question of law which we have to determine. In my opinion the learned judge has correctly stated the conclusion at which we ought to arrive in the passage of the report (1) which has already been read by the Master of the Rolls. I think it is quite clear that the authority conferred by the sub-underwriting letter was an authority coupled with an interest in the person to whom it was given, for this reason, that it was given to the Angel Court Trust who had contracted to underwrite 150,000 shares, and the sub-underwriting letter if carried into effect would relieve the Trust, the principal underwriters, of their liability to the extent of the liability incurred by Mr. Pole. I think it was plainly an authority coupled with an interest. As such, quite independently of the clause in the contract which I have already read, the contract would be irrevocable. Now what is the effect of that authority being so irrevocable ? I think the effect is expressed in *Carmichael's Case* (2), which is to my mind indistinguishable from the present case. I think the effect is well expressed by the learned judge in the passage (1) to which I have already alluded.

(1) [1920] 1 Ch. 594. (2) [1896] 2 Ch. 643.

There is another point. The appellant's case depends upon his having, as he says, withdrawn his application before the allotment in pursuance of it had been communicated to him. Of course in the ordinary case where a man applies for shares in a company that is a mere proposal, and that proposal like every other may be withdrawn before its acceptance is communicated, but in my judgment it is established here that the allotment, that is to say, the acceptance of the proposal, was communicated not to Mr. Pole personally but to the Trust, his agents, at the time it was made. The minutes of the meeting at which the allotment was made are in evidence, and from them it appears that a Mr. Young and a Mr. Hobday, both directors of the Trust, one of them also a director of the company, were present at the meeting at which the allotment was made. I think, further, that it is plain upon this letter that the authority conferred upon the Trust extended to authorize them to accept the communication of an allotment made in pursuance of the underwriting letter. That is a ground which was apparently not taken before P. O. Lawrence J., and which is not included in the judgment. Whether the case is rested upon that or whether it is rested upon the irrevocability of the authority conferred upon the Trust and the extension of that authority not only to the making of the application but to the maintaining of the application, it seems to me that the application by the appellant to have his name struck off the register as having been inserted therein without sufficient cause must fail, and this appeal ought to be dismissed with costs.

YOUNGER L.J. I am of the same opinion. This is a sub-underwriting contract, but on the facts of the case, and in view of the terms of the sub-underwriting agreement, the position as between the appellant sub-underwriter and the company was not, after allotment of shares made to him, materially different, as I think, from the position all through in respect of the shares sub-underwritten of the principal underwriters, the Trust, towards the company. In the case

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of their agreement, as is true of all ordinary underwriting agreements between an underwriter and a company proposing to make an issue to the public, the fundamental characteristic was that for the prescribed consideration the Trust was bound to take and pay for their prescribed proportion of the shares underwritten, not in the event allotted to the public. It is necessarily of the essence of such a transaction that the obligations on the part of the underwriter shall not be capable of withdrawal before actual allotment to him, whether or not they are accompanied by a form of application similar to one filled up by an applicant, a member of the public. The reason for this is that if it were open to an underwriter so to withdraw from his underwriting contract, which is substantially one of insurance to the company against the possibility of the public not coming in, the contract would be of no advantage at all to the company. On the other hand while the underwriter in this respect is under a disadvantage not shared by an ordinary applicant for shares, the underwriter has this advantage of his own, that the company notwithstanding the apparently unqualified terms of his application form may not allot to him more than the agreed proportion of the shares which in the event he is under his underwriting contract bound to take.

Now here, as I have said, it is sub-underwriting with which we have to do. There is, in the first instance, no direct contract at all between the sub-underwriter and the company, but the essence of his bargain in what I have ventured to call the fundamental characteristic of underwriting is the same as in the case of an underwriting contract between the underwriter and the company. It is the underwriter who is now being relieved from risk, and accordingly as between the sub-underwriter and him the sub-underwriter may not withdraw from his bargain once entered into, and the sub-underwriter, who has got valuable consideration for his promise from the underwriter, empowers the underwriter to bind him, the sub-underwriter, as between himself and the company, to a bargain in like terms. It is essential to the arrangement between the underwriter and the sub-underwriter that the

terms of the bargain between them shall be communicated to the company, for otherwise if these terms were not so communicated the sub-underwriter if he made a formal application in common form for the full number of shares underwritten would be at risk of having allotted to him more shares than those which in accordance with his bargain with the underwriter he was bound in the event to take. Accordingly in my opinion when a sub-underwriter enters into such a contract as the appellant entered into here, and hands that document to the underwriter as the appellant did, he hands it to the underwriter knowing that in the ordinary and necessary course of business it will in turn be transmitted to the company, and being so transmitted to the company it amounts then, as it appears to me, to an invitation to the company to act upon the terms of the bargain so constituted between the sub-underwriter and the underwriter, and when the company in response to that invitation does act upon it by allotting shares then the bargain becomes as irrevocable as between the sub-underwriter and the company as it has all along been as between himself and the underwriter. In the present case the applicant, fortunately or unfortunately for himself, discovered, after this notice of motion was given, that the actual terms of his sub-underwriting letter are not altogether in common form. This was a pure piece of good or bad fortune so far as he was concerned, because he states quite candidly in his affidavit in support of the motion that he has no copy of the sub-underwriting letter which he in fact signed nor has he seen a copy of it. In the course of the proceedings the letter was produced by the other side, and it then appeared that whereas in terms the sub-underwriting letter contemplates that there will be an actual unqualified application to the company by the sub-underwriter for his 10,000 shares underwritten, in point of fact in the applicant's case this particular provision of the sub-underwriting letter was not carried out, and no such application was signed or sent.

In my opinion, however, the filling up of such an application form was mere machinery, neither necessary nor specially

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appropriate to the real transaction, and I entirely agree with the other members of the Court and with P. O. Lawrence J. that this omission in no way affects the essential characteristic of the bargain between the sub-underwriter and the underwriter already stated. In my opinion, as I have said, as soon as that sub-underwriting letter was handed, as the appellant must have known it would be handed, to the company and was acted on by them in allotting to the applicant no more than the precise number of shares which in the event he was by the terms of his underwriting letter bound to take, there was constituted an irrevocable contract as between himself and the company from which he could not by any attempted withdrawal escape.

Like the Master of the Rolls I will not base my decision upon what would, I think, be the sufficient ground that the authority to the underwriters, the Trust, to carry out the transaction empowered them to receive on the applicant's behalf notice of the actual allotment, such notice being given as we now know before any attempt at repudiation by the applicant was made. I prefer to base my decision on the more general ground, which depends upon no such accident, affirms the essential character and quality of the applicant's obligations and fully justifies the conclusion that the applicant has failed to show, as he was bound to do if he would succeed in this application, that his name has been entered on the company's register of members without sufficient cause.

Appeal dismissed.

Solicitors for the appellant : *E. O'Connor & Co.*

Solicitors for respondents : *Churchill, Smallman & Co.*

G. A. S.

In re EADES.

EADES *v.* EADES.

[1913. E. 713.]

SARGANT J.

1920

May 18, 19.

Will—Charity—Gift to charitable and other Objects to be selected by Three named Persons—Effect of Death of one Selector without any Selection having been made—General charitable Intention.

A testator directed that the trustees of his will should out of specified moneys pay 10 per cent. to "such religious, charitable and philanthropic objects" as three named persons should jointly appoint. These three persons all survived the testator, but one of them died without any appointment having been made:—

Held, (1.) that the death of one of the appointors without any appointment having been made would not prevent a selection of charitable objects being made; but (2.) that the word "and" must be read as "or," and that, as one or more of the selected objects might be merely philanthropic and not necessarily charitable, no general charitable intention was shown, and the gift in favour of charity therefore failed.

Solomon Samuel Eades by his will, dated September 24, 1900, devised and bequeathed all his real and personal estate to his brother David Eades, his sister Phœbe Stubbs, William Stubbs and Edward Jobling (who were appointed executors), upon trust to dispose thereof according to the directions contained in the will.

One of these directions was that the trustees should, out of the profits received from certain businesses which the testator directed to be carried on, and out of the income derived from his real and personal estate or the investments thereof, pay certain annuities, interest on mortgages, and other outgoings, and, out of the balance, if any, of the profits, pay 10 per cent. to "such religious, charitable and philanthropic objects as my said wife"—who was Elizabeth Eades—"and the said David Eades and Phœbe Stubbs shall jointly appoint."

The residue was given, as to four sixths thereof, to be divided amongst certain charities, and as to the remaining two sixths amongst nephews and nieces of the testator.

The testator died on February 8, 1903, and after his death

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his businesses were carried on pursuant to the directions in his will.

Phœbe Stubbs died on May 25, 1905, and although some selections, both before and after the death of Phœbe Stubbs, had been made which no one desired to question, after her death profits were earned in respect of which no selection was ever made by the testator's widow and David Eades, or either of them, in favour of any religious, charitable or philanthropic object.

On a petition asking for payment out of funds standing to the credit of an action, questions were raised, whether the direction to pay 10 per cent. of the net profits of the business came to an end upon the death of Phœbe Stubbs without any such selection as mentioned in the will having been made, and whether, assuming that the direction had not come to an end, the trust for such religious, charitable and philanthropic objects as could be selected was good as a bequest in favour of charity, or failed.

Rolt K.C. and *A. Adams* for the petitioners stated the facts and the questions involved.

W. R. Sheldon for the British and Foreign Bible Society (entitled as one of the charities named in the will to a share in residue). The gift of 10 per cent. of the profits failed through the death of Phœbe Stubbs without the joint selection having been made. The gift was not made to the three persons but to the charities which they should select. The selection required cannot now be made, as one of the selectors is dead, and the gift fails on that account.

If that objection can be got over, it can still be said that in the gift to the objects to be selected the word " and " should be read as " or," and in that case philanthropic objects which are not necessarily charitable might be selected. The gift, therefore, cannot be construed in favour of charity generally: *In re Best* (1); *Attorney-General* v. *Boultbee* (2); *Hibbard* v. *Lamb* (3); *Baylis* v. *Attorney-General* (4); Farwell on

(1) [1904] 2 Ch. 354.
(2) (1794) 2 Ves. 380; (1796) 3 Ves. 220.
(3) (1756) Amb. 309.
(4) (1741) 2 Atk. 239.

Powers, 3rd ed., p. 514; Tudor's Charitable Trusts, 4th ed., p. 400.

D. D. Robertson and *Draper* for other residuary legatees supported the same argument, and referred to *In re Bennett.* (1)

Dighton Pollock for parties in the same interest. Apart from the fact that there was no joint selection by reason of Phœbe Stubbs dying without any selection having been made, the intention to give to charities only is not indicated, and if the disposition is read disjunctively it is clear that selection might be made in favour of a mere philanthropic object, which is not necessarily a charitable one: *Attorney-General for New Zealand* v. *Brown.* (2) [He was stopped on the second point.]

H. O. Danckwerts (*Austen-Cartmell* with him) for the Attorney-General. The gift, to comply with the will, and to be a good charitable one, must be read, as it should be, conjunctively, and the objects selected must be both charitable and philanthropic. The word "or" cannot be substituted for the word "and": *In re Macduff* (3); Lord Halsbury's Laws of England, vol. iv., p. 146. [He was stopped on the other point.]

J. E. G. de Montmorency for other parties supported the argument on behalf of the Attorney-General and referred to *In re Sutton* (4) and *Williams* v. *Kershaw.* (5)

Galbraith K.C., Bertrand Watson, A. H. Droop, J. E. Harman, F. K. Archer, J. N. Daynes, F. Baden Fuller, Wilfrid Greene, and *H. M. Broughton* were also counsel in the case.

SARGANT J. The first question raised is whether there is a good subsisting charitable or other gift, having regard to the fact that Phœbe Stubbs, who was one of the persons who were named as being those who were to select the objects of the testator's bounty, has died. If the power of selection had been vested in one person only, who had died before making

(1) [1920] 1 Ch. 305.
(2) [1917] A. C. 393.
(3) [1896] 2 Ch. 451.
(4) (1885) 28 Ch. D. 464.
(5) (1835) 5 Cl. & F. 111.

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any selection, I should have had no doubt that, a definite sum having been pointed out for distribution, the death would not have prevented the amount from being distributed. And here, where a certain definite percentage is to be distributed for purposes which I assume for the moment to be charitable, it seems to me that it is immaterial that one of the persons nominated to select the particular objects is no longer alive. That is the result of *Moggridge* v. *Thackwell* (1) and *Mills* v. *Farmer*. (2) It is clear law that a disposition in favour of charity generally does not fail for uncertainty because the particular objects are not ascertainable in the particular manner laid down by the testator.

But is this gift confined by the language of the will to objects that are necessarily "charitable," in the technical sense of that term? The word "philanthropic" by itself is undoubtedly too wide, and to render the gift good one must hold that every object of the gift should, in addition to the qualification of being "philanthropic," have the further qualification of being either "religious" or "charitable" or both. Now it is plainly inadmissible to read the words as requiring one only of these two further characteristics, that is as denoting objects which, in addition to being philanthropic, are also either religious or charitable. And the only possible constructions are therefore two, the first being one on which all the objects are to be both religious and charitable and philanthropic; and the second being one on which religious objects, and charitable objects and philanthropic objects are within the area of selection—but it is not necessary that any single object should have more than one of these three characteristics.

Such a construction as the second is sometimes referred to as a disjunctive construction, and as involving the change of the word "and" into "or." This is a short and compendious way of expressing the result of the construction, but I doubt whether it indicates accurately the mental conception by which the result is reached. That conception is one,

(1) (1803) 7 Ves. 36. (2) (1815) 1 Mer. 55.

I think, which regards the word "and" as used conjunctively and by way of addition, for the purpose of enlarging the number of objects within the area of selection; and it does not appear to be a false mental conception, or one really at variance with the ordinary use of language, merely because it involves in the result that the qualifications for selection are alternative or disjunctive.

Further, the greater the number of the qualifications or characteristics enumerated, the more probable, as it seems to me, is a construction which regards them as multiplying the kinds or classes of objects within the area of selection, rather than as multiplying the number of qualifications to be complied with, and so diminishing the objects within the area of selection. In the present case the ordinary careful student of English language and literature would, I think, almost certainly come to the conclusion that the three epithets here are epithets creating conjunctive or cumulative classes of objects, not epithets creating conjunctive or cumulative qualifications for each object.

The conclusion at which I thus arrive is entirely in accordance with the decision in *Williams* v. *Kershaw* (1); and is not necessarily at variance with the decision of Farwell J. in *In re Best* (2), where the words of qualification were two only — namely, "charitable and philanthropic."

The parties do not desire to question or reopen any small distributions amongst charities which may have actually taken place either in the lifetime of Phœbe Stubbs or since her death. I am only asked to decide as to the specified percentage of future profits and of past profits so far as remaining undistributed. As to this I decide that the gift is not necessarily charitable and is therefore void for uncertainty.

Solicitors: *Bell, Brodrick & Gray; Coward & Hawksley, Sons & Chance; W. J. & E. H. Tremellen, for H. & J. H. Simpson, West Hartlepool; Gamlen, Bowerman & Forward, for*

(1) 5 Cl. & F. 111.

(2) [1904] 2 Ch. 354.

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Brittan, Livett & Miller, Bristol; Crossman, Block, Matthews & Crossman; Van Sandau & Co.; E. C. Rawlings, Butt & Bowyer; A. E. & C. F. Pridham; J. Alexander Aldred & Rose; Nisbet, Daw & Nisbet; and *The Treasury Solicitor.*

F. E.

ASTBURY J. 1920 *May* 20. *June* 1.

In re WILLIS.

SHAW *v.* WILLIS.

[1920. W. 457.]

Will—Charity—General Charitable Intention—Gift to Charity to be selected by A. within specified Period—Death of A. before Testatrix—Discretion and its exercise of Essence of Gift—Intestacy.

A testatrix, after appointing an executor and trustee, gave her personal estate in England subject to payment of her testamentary expenses and debts and a legacy to her sister for life. She then directed that on the death of her sister certain legacies should be raised and paid, and subject thereto gave the rest and residue of her personal estate in England "to such charitable institution or society in England Russia or elsewhere as may be selected by my friend" W. "within three calendar months from the time of the decease of my sister." Both the sister and W. predeceased the testatrix:—

Held, that the testatrix had not by her residuary gift shown a paramount general charitable intention, that the discretion conferred on W. and its exercise were of the essence of the gift, and accordingly that the gift of residue failed and the residue went as on an intestacy.

ADJOURNED SUMMONS.

By her will dated June 9, 1898, Mary Willis, after appointing an executor and trustee, gave and bequeathed unto her trustee all her personal estate and effects in England upon trust to pay her funeral and testamentary expenses and debts and a legacy of 100*l.* and in the next place to sell, call in and convert into money the residue of her personal estate and effects in England and invest the same as therein mentioned and to stand possessed of the proceeds upon trust to pay the income

and annual dividends and produce thereof to her sister, Anne Willis, during her life, and after her decease upon trust to raise and pay certain pecuniary legacies including a legacy of 500*l.* to her friend Mary Whitehead; and then as to all the rest and residue of the said personal estate and effects in England she gave and bequeathed the same "to such charitable institution or society in England Russia or elsewhere as may be selected by my friend the said Mary Whitehead within three calendar months from the time of the decease of my sister the said Anne Willis." The testatrix also made a codicil to her will dated July 13, 1915, by which after giving two pecuniary legacies she ratified and confirmed her said will in every other respect.

The testatrix, who was a British subject residing formerly at Petrograd in Russia and afterwards at San Remo in Italy, died on September 23, 1917. Both Anne Willis and Mary Whitehead predeceased the testatrix. The executor named in the will renounced probate and administration with the will and codicil annexed was taken out by the plaintiff on January 16, 1920.

On February 23, 1920, this summons was taken out raising the question whether the bequest of residue had failed or whether by the application of the doctrine of cy près or otherwise the bequest was still valid and subsisting and could be carried into effect.

Rudall for the plaintiff.

H. O. Danckwerts (*Austen-Cartmell* with him) for the Attorney-General. There is a general charitable intention with regard to the residue which can and ought to be carried out by the Court, although the selection of the particular charity by Mary Whitehead has become impossible: Tudor on Charitable Trusts, 4th ed., pp. 97–100; *Moggridge* v. *Thackwell* (1); *Mills* v. *Farmer* (2); *Baylis* v. *Attorney-General* (3); *Attorney-General* v. *Gleg.* (4) There is also a decision of Sargant J., heard on May 18, 19 last, which assists this conclusion: *In re*

(1) (1803) 7 Ves. 36.
(2) (1815) 1 Mer. 55; 19 Ves. 482.
(3) (1741) 2 Atk. 239.
(4) (1738) 1 Atk. 356.

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Eades. (1) This is not, however, a case where a scheme will be settled by the Court, but the disposition of the gift is in the King by sign manual: *In re Pyne.* (2)

Micklem K.C. and *D. H. Cohen* for the next of kin. This is an entirely novel point. On the terms of this will there is no indication of a general charitable intention. It is a gift to such charity as Mary Whitehead may select. She was not a trustee and had no duty to select. The Court could not have compelled her to select a charity within the period specified had she been living, and the Court therefore has no locus standi to make a selection in her place.

Moggridge v. *Thackwell* (3) and *Mills* v. *Farmer* (4) are distinguishable, as in those cases there was a direct gift to or trust in favour of a charity and the Court could enforce it. In *Attorney-General* v. *Gleg* (5) the authority given was coupled with an interest. This is the simple case of a conditional charitable gift, and as the condition cannot be complied with the gift fails ab initio and the cy près principle has no application: *Cherry* v. *Mott* (6); *Chamberlayne* v. *Brockett.* (7) Further, the power of selection given to Mary Whitehead was part of the gift and this is not a case like *Reeve* v. *Attorney-General* (8) where it was held that the discretion given was not of the essence of the gift. This case is unlike any other in that not only has the charity to be selected by a particular person but the selection has to be made within a specified time. There is no general charitable intention shown, for the selection is not left to a trustee but to a friend of the testatrix who had no interest but presumably knew the testatrix's intention. Lastly, any charitable intention that is shown contemplates the residue going abroad, and the Attorney-General cannot administer a foreign charity: *New* v. *Bonaker* (9); compare *Attorney-General* v. *Sturge.* (10)

(1) Not then reported, but now reported ante, p. 353.
(2) [1903] 1 Ch. 83.
(3) 7 Ves. 36.
(4) 1 Mer. 55; 19 Ves. 482.
(5) 1 Atk. 356, 417.
(6) (1836) 1 My. & Cr. 123.
(7) (1872) L. R. 8 Ch. 206, 211.
(8) (1843) 3 Hare, 191.
(9) (1867) L. R. 4 Eq. 655.
(10) (1854) 19 Beav. 597.

H. O. Danckwerts in reply. There is a general charitable intention to give to a charity anywhere and it is immaterial that the Attorney-General cannot administer a foreign charity. It is also quite immaterial that the selection here was to be made within a time limit. A case closely resembling this is *Attorney-General* v. *Hickman.* (1) *Mills* v. *Farmer* (2) and *In re Pyne* (3) are directly in point here. There was a mere failure of machinery and the general charitable intention remains. The absence of a gift over here supports the view that there was a general charitable intention. Even if Mary Whitehead had survived and declined to select a charity within the time limit, this would not have defeated the charitable intention.

ASTBURY J. This is an application by the administratrix of the will of Mary Willis deceased for a decision as to the validity of a residuary gift in the will. [His Lordship stated the facts and continued:] The question to be decided is whether the gift or bequest of the residue of the testatrix's estate to "such charitable institution or society in England Russia or elsewhere as may be selected by my friend the said Mary Whitehead within three calendar months from the time of the decease of my sister the said Anne Willis," is a valid charitable gift or whether the same fails in the circumstances I have mentioned. The Probate Court by granting administration with the will and codicil annexed to one of the next of kin in the absence of the Attorney-General apparently took the view that the residuary gift was invalid.

The general rule applicable to cases of this kind is laid down in Tudor's Charitable Trusts, 4th ed., p. 97: "Where a charitable intention is shown which is not confined to an object initially impracticable or illegal, it is immaterial to the validity of the gift that the particular objects are left indefinite or, if specified, are impracticable or illegal. Where the substantial intention is charity, the law provides a mode for carrying that intention into effect, if no particular mode

(1) (1732) 2 Eq. Cas. Abr. 193, pl. 14.
(2) 1 Mer. 55; 19 Ves. 482.
(3) [1903] 1 Ch. 83.

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is prescribed by the donor; or, if a particular mode is prescribed which cannot be accomplished, it substitutes another in its place."

The general rule acted upon by the Courts over a long period is expressed by Lord Eldon in *Moggridge* v. *Thackwell* (1), and the authorities on the whole appear to show that if there is a general charitable intention, that will be enforced by the Court although the particular mode or machinery for giving effect to it is either uncertain or cannot be carried out in accordance with the directions of the donor. Further, if the selection of the charity or charitable object is in the hands of a trustee charged with the duty of selection, then if such trustee predeceases the testator or is otherwise not available the Court will give effect to the trust in the many ways which appear from the authorities. But there must, as it appears to me, be a direct charitable intention or charitable trust which the Court is able to enforce.

In *Moggridge* v. *Thackwell* (1) Lord Eldon said: "If the testator has manifested a general intention to give to charity the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished"; and in that case, though with apparent reluctance, the Court decided that the charitable gift must prevail on the ground that the person charged with the selection of the particular objects to take under the general charitable intention was, in the circumstances, a trustee of the fund for the purpose of making that selection. In *Mills* v. *Farmer* (2) as reported by Merivale, Lord Eldon again dealt with the matter and said: "A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into

(1) 7 Ves. 36, 69. (2) 1 Mer. 55, 94, 95.

execution by this Court, which will then supply the mode which alone was left deficient." And a little before: "There is no question, that the Court has not the power to make a will for the testator, but only to carry into execution that which he has made himself." In the report of the same case in Vesey (1) Lord Eldon said: "I consider it now established, that although the mode, in which a legacy is to take effect, is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold, that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance; providing a mode for that legatee to take, which is not provided for any other legatee."

Counsel referred me to a number of other authorities but I do not propose to go through them, as they are all summed up in *Moggridge* v. *Thackwell* (2) and the cases that followed it and I think they establish the principle I have attempted to enunciate.

The second matter which must be borne in mind is that a charitable legacy may, like any other legacy, be conditional; and the third is that a discretion and its exercise may in certain cases be of the essence of the gift and especially so when no general charitable intention is shown or no special charitable trust created.

Here it is impossible to say that there is a general charitable intention which is paramount with regard to the residuary gift. The testatrix having bequeathed property to a trustee directs that it shall pass at the death of the tenant for life subject to certain legacies "to such charitable institution or society in England Russia or elsewhere as may be selected by my friend the said Mary Whitehead within three calendar months from" the death of the tenant for life. Mary Whitehead was not a trustee. There is no machinery by which if living she could have been compelled to make a selection, and her selection was one which had to take place within a short and defined time. It seems to

(1) 19 Ves. 482, 486.

(2) 7 Ves. 36.

ASTBURY J. 1920 WILLIS, *In re.* SHAW *v.* WILLIS.

me that that is a gift conditional upon a person who is not a trustee making a selection within a defined period, and that this discretion and its exercise are of the essence of the gift.

In these circumstances I am of opinion that the charitable gift as such fails and that the testatrix died intestate with regard to this particular residue. Although it is not necessary to decide it on the view that I have taken on the construction of the will, I am not at present satisfied that a cy près scheme could be arrived at in view of the provision that the charitable object is to be "in England Russia or elsewhere."

Solicitors: *The Treasury Solicitor for the Attorney-General; Francis A. Rudall for the remaining parties.*

H. C. G.

P. O. LAWRENCE J. 1920 *May* 4, 5, 6, 7.

BURN *v.* NATIONAL AMALGAMATED LABOURERS' UNION OF GREAT BRITAIN AND IRELAND.

[1919. B. 1555.]

Trade Union—Rules—Executive Committee—Suspension of Officer—Ultra vires Resolution—Principle of Natural Justice.

A registered Trade Union had numerous Branches. The Union had a Chairman, a General Secretary, Treasurer, Trustees and two Auditors who were elected at the annual general meeting of the Union. Each Branch elected similar officials for itself. The annual general meeting consisted of delegates from the various Branches. The supreme government of the Union was in the annual general meeting, but the general management of the Union was vested in an Executive Committee elected at the annual general meeting. A rule of the Union empowered the Executive Committee (inter alia) to take every means to secure the observance of the Union's rules, to remove any incompetent or insubordinate officer, and to suspend, expel and prosecute members acting contrary to the rules.

For two years before April, 1916, B. was Treasurer of his Branch and was negligent in his duties, and the Secretary of the Branch without his knowledge misappropriated moneys. These matters were not discovered until the summer of 1918, and came before the Executive Committee in November, 1918, when the committee, disregarding B.'s application to appear before them in his defence, passed a resolution

that B. "be removed from any office then held by him and not permitted to hold any delegation on behalf of the Union for a period of five years." At the date of the resolution B. was Chairman of his Branch and one of the General Auditors of the Union and his competency in these offices had not been questioned. In an action by B. to restrain the Union and the Executive Committee from acting on the resolution on the ground that it was ultra vires:—

Held, that the rule must be construed strictly and did not justify the resolution.

Held, also, that, if the resolution were within the rule, the Executive Committee ought, on the principles of natural justice, to have given B. an opportunity of appearing before them in his defence before they passed the resolution.

The injunction was accordingly granted.

WITNESS ACTION.

The defendant Union was established in 1889 for the benefit of all classes of labourers of either sex, and its rules were registered under the Trades Union Acts, 1871 and 1876. It comprised numerous branches, and its material rules were the following :—

"Rule 2 (1.) For the supreme government of the Union there shall be an Annual General Meeting. In addition to the President, General Secretary, and one Executive Committee Member, who shall be members thereof ex-officio, it shall consist of not more than sixty members. . . . . Each Branch shall elect its proportion of representatives, and what number that proportion must be shall be decided by the Executive Committee hereinafter mentioned. . . . .

"(3.) The Annual General Meeting shall have power to amend, rescind or make rules to remove from office any officer of the Union. . . . . It shall also govern the Executive Committee.

"Rule 3 (1.) For the general management of the Union there shall be an Executive Committee, consisting of the President of the Union, General Secretary, and eight representatives chosen by the Annual Meeting. . . . .

"(3.) The meetings of the Executive Committee shall be held quarterly. . . . .

"(4.) The powers of the Executive Committee shall be limited to the management and superintendence of the Union.

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It shall take every means to secure the observance of the Union's Rules, to perform all duties allotted to it by the said Rules, to further the objects of the Union, and to protect its funds from misappropriation, it shall direct the action of the trustees, and be responsible for the right administration of all the funds. It may suspend, expel and prosecute any member obtaining benefits by misrepresentation or improperly receiving the same. . . . . It shall have power to determine questions on which any Rule is silent. . . . . It shall institute legal proceedings on behalf of the members of the Union, and direct the Trustees to prosecute any officer of the Union, or member or other person who appropriates, misapplies or withholds the funds of the Union. It may remove any incompetent or insubordinate officer. It may suspend, expel and prosecute members acting contrary to the Rules. . . . . In the absence of the Executive Committee the General Secretary shall have full power to take any action for the Executive Committee that these Rules allow, and report such action to the next Executive Committee Meeting.

"Rule 4 (1.) The General Secretary of the Union is a permanent official. . . . .

"(9.) He shall, under the supervision of the Executive Committee, make out and forward from time to time to the Registrar, all returns required by the Trades Union Acts, such statements to be issued by the Branches not later than the last day in March of each year. He must audit the Branch balance sheet and prepare an annual report. . . . .

"(10.) The accounts of the General Office shall be audited each year by two auditors appointed by the Annual General Meeting, to whom the General Secretary shall produce all books and papers of the General Office necessary for a complete examination of the Union's accounts. . . . .

"Rule 7 (1.) Each Branch of the Union shall have for its management a Secretary, Check Secretary, Treasurer, three Trustees, and a Committee of not less than seven members (if necessary the Branch may elect a Chairman and a Doorkeeper). . . . .

"(3.) The funds of each and every Branch shall be the common property of the Union, and shall only be applied for the purposes and in the manner prescribed in these Rules. . . . .

"Rule 8. *Branch Officers and their Duties* (1.) All Officers (except Treasurer and Secretary) shall be elected quarterly. . . . . The Treasurer and Secretary shall hold office during the pleasure of the Branch.

"(2.) Should any officer, in the opinion of the Branch, be incompetent, or fail to perform his duty, or act contrary to the interests of the Union, he shall be dismissed, and the Branch shall elect another in his place. . . . .

"(3.) The Chairman shall preside at all meetings of the Branch, and conduct the meetings with propriety and order. He shall sign all minutes of the Branch and all quarterly returns at the end of each quarter.

"(4.) The Branch Secretary shall keep all books and accounts belonging to his office. . . . . He shall supply the General Office with a quarterly balance sheet . . . . showing the income and expenditure of the Branch.

"(6.) The Treasurer shall receive from the Secretary the money received on account of the Branch, and bank in the name of the Trustees and the Union all monies in excess of the amount allowed for the current payments of the Branch, such sum not to exceed 5*l*. . . . . He shall hold office during the pleasure of the Branch and his salary shall be fixed by the Branch. . . . .

"(8.) Each Branch shall have two Auditors. . . . . Their duties shall be to audit each quarter all books, receipts, and documents connected with the financial transactions of their Branch, and report to the Branch the manner in which they found the books and accounts. Before sending the report to the General Office it must be signed by the Treasurer and Auditors."

"Rule 16 (3.) All members of this Union . . . . must conform to these Rules."

The plaintiff was a member of the defendant Union, and from July, 1914, to April, 1916, he was Treasurer of the Cardiff

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No. 1 Branch of the Union, and then ceased to be Treasurer. In September, 1916, he was elected Chairman of his Branch and continued to hold that position until the date of the resolution hereafter mentioned. As a delegate of his Branch he attended the Annual General Meeting of the Union in August, 1917, and was then elected one of the two General Auditors of the Union, and performed the duties of that office for the year ending January 31, 1918.

In the summer of 1918 the accounts of the Branch for a period prior to and during the Treasurership of the plaintiff were investigated, and it appeared from the report of the investigators that the Secretary of the Branch had during that period misappropriated subscriptions received by him from members, and for this he was prosecuted. It also appeared that the plaintiff had no knowledge of the defalcations of the Secretary, but had been negligent in his duties whilst Treasurer. No imputation however was made against the honesty or integrity of the plaintiff nor did his Branch pass any resolution against him either as Treasurer or Chairman. In October, 1918, an interview took place between the plaintiff and Mr. Twomey, the General Secretary of the Union, on the report of the investigators. Mr. Twomey pointed out to the plaintiff that during his office as Treasurer there was a deficiency in the Branch banking account of 4*l.* 17*s.*, which appeared in the Branch balance sheet for the March quarter of 1916, which he had signed as Treasurer and for which he was responsible, and also that he had not regularly banked the moneys he had received from the Branch Secretary, but had retained them in his hands for an undue length of time. The plaintiff replied that he had banked all that he received from the Secretary and that so far as he was aware his books were quite in order when he gave up the office of Treasurer; he admitted he had not checked the quarterly balance sheets, but had relied on the Auditors and had trusted the Secretary, and he asked for an independent audit by a chartered accountant at his own expense; and with regard to the undue retention of moneys he alleged that other Treasurers did the same. Mr. Twomey stated that the Executive Committee would deal

with the matter at their next meeting, and the plaintiff asked to appear before them to explain his position.

The Executive Committee at their next meeting held on November 11, 1918, considered the investigators' report, and Mr. Twomey also reported his interview with the plaintiff, and the Committee, disregarding the plaintiff's request to appear before them in his defence, passed a resolution that the plaintiff be removed from any office then held by him and not permitted to hold office or perform any delegation on behalf of the Union for a period of five years from that date. This resolution was communicated to the plaintiff on November 30, 1918, and he at once wrote to Mr. Twomey and protested against the resolution and demanded an opportunity of appearing before the Executive Committee to go into the matter. His letter was read at the next meeting of the Executive Committee held on December 30, 1918, and was not complied with, and at the next meeting of the Executive Committee held on February 11, 1919, the President declared that, in consequence of the plaintiff having been removed from the office of Senior Auditor of the Union by the resolution of November 11 last, the office was vacant, and another member was appointed to the office. After some correspondence and county court proceedings the plaintiff on June 19, 1919, commenced this action against the Union claiming a declaration that the resolution of November 11, 1918, was ultra vires as being unauthorized by the constitution of the Union or by any of its rules, and as being contrary to natural justice in that the Executive Committee had not given the plaintiff an opportunity of stating his case before them and had not acted in the matter of the said resolution in a judicial manner; and an injunction restraining the Union, the Executive Committee, their officers and servants from acting upon or enforcing the said resolution.

The Union by its statement of defence referred to its rules, and relied in particular upon rule 3(4.); rule 8(4.)(6.)(8.); and rule 16 (3.); and alleged that it was the duty of the plaintiff as a member of the Union and as Treasurer of the Cardiff Branch to conform to the said rules, and in particular as such

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Treasurer to bank all money received from the Secretary of the said Branch in excess of the amount allowed for current expenses as soon as possible and not to retain the same in his own hands for an unreasonable time, nor to sign the quarterly balance sheets before ascertaining that the statements made therein were correct; that the plaintiff in not conforming to the said rules was guilty of negligence and of a breach of duty and by reason of the premises was incompetent to discharge the office of Treasurer of the said Branch and for General Auditor of the Union; that the plaintiff had a full opportunity of explaining his position at his said interview with Mr. Twomey, which was duly reported to the Executive Committee, and that at the time when the resolution was passed the Committee had all the facts before them and no further explanation or inquiry would have added thereto; and that the Committee after considering the facts and the plaintiff's said explanation passed the resolution by virtue of its powers in that behalf as a disciplinary measure for the purpose of securing the observance of the rules and of protecting the funds of the Union. The defence also set up that the action was not maintainable by reason of the provisions of the Trade Disputes Act, 1906, s. 4 (1.).

The plaintiff attended the Annual General Meeting of the Union held in August, 1919, and spoke at length on his position whilst Treasurer of his Branch, and a resolution was passed that if he withdrew his pending action against the Union and paid all the costs of the Union he should be reinstated to full membership of the Union.

H. H. Slesser for the plaintiff. In the first place, the resolution was not justified by rule 3 (4.), which must be construed strictly. Under rule 2 (1.) the supreme power is in the annual general meeting and by rule 3 (4.) the powers of the Executive Committee are limited to the management and superintendence of the Union. The power to remove any incompetent officer or to suspend any member acting contrary to the rules must mean an officer who is incompetent in the office he is holding or who is acting contrary to the rules. Here the only offices

the plaintiff was holding at the date of the resolution was Chairman of his Branch and general Auditor of the Union, and he was removed from those offices although his competency in those offices had never been questioned. Moreover the rule does not authorize depriving a member of all his rights and privileges as a member for an alleged breach of the rules committed some two years previously. Further, every Branch has the right under rules 7 and 8 to appoint its own officials and to elect its own delegate and the power to remove an incompetent official, and the Executive Committee has no power under rule 3 (4.) to interfere with that right. Again, the Committee purported to remove their superior officer because the plaintiff, who audited their accounts, was appointed under rule 4 (10.) by the Annual General Meeting and could only be removed by that body. In the next place, the resolution was not a tortious act done in furtherance of a trade dispute within the meaning of s. 4 of the Trade Disputes Act, 1906, but it was a breach of the contractual obligations existing between the plaintiff and the members of the Union and was a serious invasion on his common law rights: *Parr* v. *Lancashire and Cheshire Miners' Federation* (1); *Osborne* v. *Amalgamated Society of Railway Servants.* (2)

[*Owen Thompson K.C.* for the defendants. I agree that the Trade Disputes Act does not apply.]

Lastly, even if the power exercised by Executive Committee was within the rule, they were acting in a quasi-judicial capacity and it was contrary to natural justice to decide against the plaintiff without giving him an opportunity of being heard in his defence: *Labouchere* v. *Earl of Wharncliffe* (3); *Fisher* v. *Jackson.* (4)

Owen Thompson K.C. and *H. Morris* for the defendants. The powers given to the Executive Committee by rule 3 (4.) are powers for the government of the Union when the Annual General Meeting is not sitting, and they are very wide and directory powers. They may expel or suspend a member. They have power to decide questions on which the rules are

(1) [1913] 1 Ch. 366, 374.
(2) [1911] 1 Ch. 540, 560.
(3) (1879) 13 Ch. D. 346, 350–1.
(4) [1891] 2 Ch. 84.

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silent, and to take every means to enforce the observance of the rules. The General Auditors are officers of the Union, and the Executive Committee can, under the power "where the rules are silent," remove a member from being a General Auditor and from being Chairman of a Branch. The power to enforce "observance of the rules" is not a penal clause but a disciplinary power of administration, as between master and servant, under which the Committee have power to suspend a member from certain of the privileges attaching to his membership. The Committee were under no duty to hear the plaintiff before exercising this power, because they were exercising a disciplinary act of administration. It is not like the expulsion of a member from a club. They were not acting in a judicial or quasi-judicial capacity but were exercising the right of an employer to dismiss an officer of the Union who was incompetent and had not observed the rules: *Ridgway* v. *Hungerford Market Co.* (1) The plaintiff is not suspended from membership, but only from office. It is not a case of expulsion. The resolution was an ordinary act of management and administration of a governing body involving a discretion not of a judicial or quasi-judicial character: *Weinberger* v. *Inglis* (2); and in *Harries* v. *Crawfurd* (3) it is pointed out that in *Fisher* v. *Jackson* (4) the vicars were acting in a quasi-judicial capacity. Here the Committee had before them documents which plainly showed the offence that had been committed, and they inflicted a just, if somewhat drastic, penalty for what had been done in the interests and for the protection of all the members of a large Union. Moreover, he was heard at length at the Annual General Meeting held soon after the action had been commenced.

H. H. Slesser in reply referred to *Young* v. *Ladies' Imperial Club.* (5)

P. O. LAWRENCE J. On November 11, 1918, the Executive Committee of the defendant Union resolved that the plaintiff

(1) (1835) 3 Ad. & E. 171, 177.
(2) [1918] 1 Ch. 517, 546.
(3) [1918] 2 Ch. 158, 171.
(4) [1891] 2 Ch. 84.
(5) (1920) 36 Times L. R. 392; [1920] 2 K. B. 523.

should be removed from office and not be permitted again to hold any office pertaining to the Union for a period of five years from that date. The plaintiff complains that that resolution is one which the Executive Committee had no power to pass under the rules; and further that, if they had such power, it was contrary to natural justice to pass the resolution without first hearing the plaintiff. The circumstances under which the resolution was passed are shortly these. [His Lordship stated the facts and continued:] The question is whether that resolution can be justified under the rules and, if it can, whether it can be justified in the circumstances in which it was passed.

Dealing with the first part of the question, I hold as a fact that the Executive Committee did not purport to exercise the power of removing an officer for incompetence or insubordination. They had that power but they did not exercise it. At the date of the resolution the plaintiff had ceased to be the Treasurer of the Branch, and the only offices which he then held were those of Chairman of Branch No. 1 and of General Auditor of the Union. His conduct in those offices never came in question and was not considered. But it is said that the resolution can be justified as coming under rule 3 (4.), because it was passed, either under the power therein contained to take every means to secure the observance of the Union's rules; or under the power also therein contained to suspend, expel and prosecute members acting contrary to the rules. In my opinion the power contained in this rule to take every means to secure the observance of the Union's rules does not authorize the Executive Committee to remove a member from office or to prevent a member from holding any office or delegation pertaining to the Union. Nor does this power in my opinion give authority to punish or penalize a member except in the manner prescribed by the rule itself. Then as regards the power to suspend, expel and prosecute members acting contrary to the rules, I think that that power, being in its nature penal, has to be exercised strictly in accordance with the language of the rule and does not justify what was attempted to be done here. The rule does not in my

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opinion imply a power to inflict penalties of a different kind from those enumerated, although the penalties in fact inflicted may be less severe than those specified in the rules. It is however further argued that the resolution is in fact a resolution for the suspension of the plaintiff, although it operates as a suspension of part only of his rights and privileges. In my view that argument is not sound, and I do not think that the rule, by conferring upon the Committee a power to suspend a member from membership, authorizes the Committee to prohibit a member without suspending him from membership from enjoying some of the rights and privileges of membership. The rule does not in express language permit of that to be done, and I hold that such a power ought not to be implied.

But assuming that I am wrong in the construction which I have placed upon rule 3, and that the penalty purported to be inflicted upon the plaintiff is one which the Executive Committee had power to impose, the question arises whether, before inflicting it, they ought not on the principle of natural justice to have given the plaintiff an opportunity of being heard in his own defence. That in turn depends upon whether the power is one of a quasi-judicial nature, or is, as has been contended, a mere disciplinary administrative power. I have no hesitation in holding that the power to suspend or expel a member for acting contrary to the rules is one of a quasi-judicial nature. It involves an inquiry, because it only arises if the member has acted contrary to the rules. The first obligation on the Executive Committee before attempting to exercise that power is to satisfy themselves that the member has acted contrary to the rules, and in common fairness a man who is charged with a breach of the rules of the Union to which he belongs ought to be heard so as to enable him not only to rebut the charge if it can be rebutted, but also if it cannot be rebutted to explain the circumstances under which the breach was committed so as to enable the Committee to decide what, if any, penalty should be inflicted. I cannot conceive anything more contrary to our notions of justice than to decide against

a member that he has committed a breach of the rules and to penalize that member for such breach without giving him a chance of being heard in his own defence. I have no doubt that the Committee in the present case acted in perfect good faith. Not being used to exercising quasi-judicial powers however they thought that the case was too clear for argument and that the plaintiff could not have anything to say for himself. A greater fallacy than that I cannot imagine. Judging merely by what happened afterwards I think that there was at least a reasonable probability that no such penalty would have been inflicted on the plaintiff if he had been heard and had explained his position. I do not mean to suggest that the omission of the plaintiff to satisfy himself as to the exact amount of the bank balances before signing the quarterly reports was not in the highest degree blameworthy nor that the Committee would have been wrong if after hearing the plaintiff they had rejected his excuses for not checking the bank balances and for not having paid the moneys which he had from time to time received from the secretary promptly into the bank instead of having held them in his own hands for lengthy periods, but in my judgment the Committee were entirely wrong in coming to the conclusion that they ought to judge and pass sentence on the plaintiff without hearing him, and without giving him an opportunity to give such explanation as he desired to give in order to enable them to consider whether they should inflict any and what punishment on him. It is admitted that the penalty which has been inflicted on the plaintiff is a very severe one, and in my opinion the Committee acted contrary to natural justice in inflicting it without giving the plaintiff a chance of being heard. The result is that I have come to the conclusion that the resolution of November 11 was one which was not warranted under rule 3 (4.); and further, even if it were so warranted, that it was one which cannot be supported because the plaintiff was not given an opportunity of being heard before it was passed.

But it is argued by Mr. Morris that even then I ought not to grant the relief asked for, because at the Annual General

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Meeting held in August, 1919, after the action had been commenced, the plaintiff, who had been invited to attend, gave his explanation at length, and after he had given his explanation the meeting ultimately resolved to confirm the decision arrived at by the Executive Committee. In my view that proceeding in August, 1919, does not in any way debar the plaintiff from obtaining the relief claimed by him in this action. After the plaintiff had given his explanation, the meeting by an overwhelming majority considered that the plaintiff was a fit and proper person to be admitted a full and free member with the right to hold office in the Union, but they made it a condition of passing a resolution to that effect that the plaintiff should pay certain costs amounting to about 25*l.*, and that if he did not pay that sum the decision of the Executive Committee should be affirmed. The plaintiff did not pay the costs, and Mr. Morris contends that the result of this non-payment is that the Annual General Meeting has passed a resolution confirming the decision of the Committee after having heard the plaintiff. I think such a resolution as that come to by the Annual General Meeting stands self-condemned as soon as it is stated. The punishment meted out to the plaintiff was one which could only be properly inflicted upon him if he were proved by his past conduct to be an unfit and improper person to hold office in the Union. To say that the plaintiff is a fit and proper person to hold office, but if he fails to pay 25*l.* towards the funds of the Union the meeting will resolve to affirm the Committee's decision that he is an unfit and improper person to hold office, appears to me to be an abuse of the power of suspension or expulsion contained in the rules, and moreover is an attempt to impose a pecuniary penalty upon the plaintiff which is wholly unauthorized. For these reasons I have come to the conclusion that the resolution passed by the Annual General Meeting after the date of the commencement of this action does not in any way affect the relief to which I hold the plaintiff to be entitled. I propose therefore to make a declaration that the resolution of November 11, 1918, was not authorized by the rules, and further that it is one

which, even if authorized by the rules, was passed contrary to natural justice, inasmuch as the plaintiff was not given an opportunity to defend himself; and I grant the injunction asked for.

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Solicitors for the plaintiff: *Lawrence Jones & Co., for Forsdike, Buchannan & Giles, Cardiff.*

Solicitors for the defendants: *Barlow, Barlow & Lyde, for J. Evan Rowlands, Swansea.*

H. L. F.

In re HALE'S PATENT.

SARGANT J. 1920 *July* 22.

[1920. H. 1677.]

Patent—User by the Crown—Dispute—Tribunal—Meaning of "the Court"—Patents and Designs Act, 1919 (9 & 10 *Geo.* 5, *c.* 80), *ss.* 8, 21, 22.

Where a Government department has used a patented invention before the coming into operation of s. 8 of the Patents and Designs Act, 1919 (April 23, 1920), although the dispute between the patentee and the Treasury as to the amount of compensation to be paid to the patentee has not been settled, s. 8 is not retrospective so as to entitle him to proceed under sub-s. (2.) thereof, but he must proceed under s. 29 of the Patents and Designs Act, 1907, for which s. 8 of the Act of 1919 is now substituted as regards the user of inventions after April 23, 1920. The term "the Court" in s. 8 of the Act of 1919 means any judge of the High Court of Justice, and not merely the Patent Judge selected by the Lord Chancellor under s. 92, sub-s. (2.), of the Act of 1907.

FREDERICK MARTEN HALE obtained letters patent, 15,045 of 1908, 10,494 of 1909, 4925 of 1911, 26,764 of 1911, 11,394 of 1913, 2057 of 1914; 22,601 of 1914 and 22,777 of 1914, all for inventions relating to projectiles and the like, to be used in warfare.

Some, at any rate, of the things invented were used by the Government in the late war before April 23, 1920.

By s. 29 of the Patents and Designs Act, 1907, it is provided that "A patent shall have to all intents the like effect as against the King as it has against a subject: Provided that any

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Government department may, by themselves, their agents, contractors, or others, at any time after the application, use the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all parties interested."

In March, 1918, Hale presented a petition to the Treasury claiming a large sum, or alternatively a percentage commission on the price of grenades and bombs protected by his patents supplied to the Government since March, 1915.

The counter-statement of the Treasury to the petition raised the questions of invalidity and infringement of the patents, which questions the Treasury considered they could not deal with, inasmuch as s. 29 of the Act of 1907 only gave them power to settle the amount payable for the use of the patented inventions. Nevertheless the Treasury offered to pay Hale a certain sum without prejudice to the questions of validity and infringement.

The petition was pending early in March, 1919, and on the 19th of that month a Royal Commission on Awards to Inventors was appointed by Royal Warrant to settle the terms of user of patented inventions used by the Crown during the war in the place of the Treasury under s. 29 of the Act of 1907.

In May, 1919, Hale's solicitors wrote to the Secretary of the Treasury suggesting that the Royal Commission should be asked to determine what should be allowed to Hale for the use of his inventions upon the assumption that all his patents used by the Government were valid, and that this should be without prejudice to the Government's right to contend that all or any of the patents were invalid. The Treasury in June, 1919, sent a copy of the letter to the Minister of Munitions and pointed out that under the Royal Warrant the Commissioners might settle the terms of user of patented inventions in lieu and place of the Treasury under s. 29 of the Act of 1907, but that under that section the Treasury were only called upon to determine the amount to be paid for

user, and that it was not their practice to hear cases unless both validity and infringement were admitted, and that in strictness the Commissioners should consider that their functions were equally limited. The Commissioners apparently took the same view as to the limitation of their powers.

There was, therefore, before April 23, 1920, a dispute as to the use of Hale's inventions.

On December 23, 1919, the Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), was passed, and therein the Patents and Designs Act, 1907, was referred to as "the principal Act." The sections of the Act of 1919 material to this report are stated below (1).

(1) Sect. 8. "For section twenty-nine of the principal Act, the following section shall be substituted:—

"29.—(1.) A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject:

"Provided that any Government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing by them at any time after the application, make, use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled in the manner hereinafter provided. And the terms of any agreement or licence concluded between the inventor or patentee, and any person other than a Government department, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown:

"Provided further that, where an invention which is the subject of any patent has, before the date of the patent, been duly recorded in a document by, or tried by or on behalf of, any Government department (such invention not having been communicated directly or indirectly by the applicant for the patent or the patentee), any Government department, or such of their agents, contractors, or others, as may be authorised in writing by them, may make, use and exercise the invention so recorded or tried for the service of the Crown, free of any royalty or other payment to the patentee, notwithstanding the existence of the patent. If in the opinion of the department the disclosure to the applicant or the patentee, as the case may be, of the document recording the invention, or the evidence of the trial thereof, if required, would be detrimental to the public interest, it may be made confidentially to counsel on behalf of the applicant or patentee, or to any independent expert mutually agreed upon.

"(2.) In case of any dispute as to the making, use or exercise of an invention under this section, or the terms therefor, or as to the existence or scope of any record or trial as aforesaid, the matter shall be referred to the court for decision, who shall have power to refer the whole matter or any question or issue of fact

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The material provisions of the Act of 1919 came into force on April 23, 1920, by virtue of an Order of the Board of Trade.

arising thereon to be tried before a special or official referee or an arbitrator upon such terms as it may direct. The court, referee, or arbitrator, as the case may be, may, with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference and for the determination of the issues between the applicant and such Government department. The court, referee, or arbitrator, further in settling the terms as aforesaid, shall be entitled to take into consideration any benefit or compensation which the patentee, or any other person interested in the patent, may have received directly or indirectly from the Crown or from any Government department in respect of such patent.

"(3.) The right to use an invention for the services of the Crown under the provisions of this section or any provisions for which this section is substituted shall include, and shall be deemed always to have included, the power to sell any articles made in pursuance of such right which are no longer required for the services of the Crown.

"(4.) Nothing in this section shall affect the right of the Crown or of any person deriving title directly or indirectly from the Crown to sell or use any articles forfeited under the laws relating to the customs or excise."

Sect. 21.—"(1.) This Act shall, except where otherwise expressly provided, apply to patents granted and applications for and specifications relating to patents made and deposited, and designs registered, before as well as after the passing of this Act.

"(2.) Where by this Act any enactments or words are directed to be added to or omitted from the principal Act, or to be substituted for any other enactments or words in the principal Act, copies of the principal Act printed under the authority of His Majesty's Stationery Office after such direction takes effect may be printed with the enactments or words added or omitted, or substituted for other enactments or words as such direction requires, and with the sections, subsections, and paragraphs thereof numbered in accordance with such directions; and the principal Act shall be construed as if it had at the time at which such direction takes effect been made with such addition, omission, or substitution.

"(3.) A reference in any Act of Parliament or other instrument to the principal Act shall, unless the context otherwise requires, be construed to refer to the principal Act as amended by this Act. . . . ."

Sect. 22, sub-s. (2.) "The provisions by sections one and two of this Act substituted for sections twenty-seven and twenty-four of the principal Act shall not come into operation until such time, not being later than one year after the passing of this Act, as may be fixed by order of the Board of Trade, except so far as the provisions so substituted for the said section twenty-four are by subsection (2.) of section six of this Act applied to the patents therein mentioned; and the provisions of this Act relating to the terms on which an invention or registered design can be made, used or exercised by or on behalf of a Government department shall not come into operation until such time as may be fixed by order of the Board of Trade; save as aforesaid this Act shall come into operation on the passing thereof."

On June 12, 1920, Hale served on the Minister of Munitions notice of an originating motion, intituled in the matters of s. 29 of the Act of 1907 and his above-mentioned patents, that the High Court would be moved on June 25, 1920, before Sargant J. "to decide a dispute which has arisen between the Ministry of Munitions and the applicant in reference to the terms upon which the applicant's inventions, which are subject-matters of the said letters patent respectively, have been made, used and exercised by the said Ministry of Munitions for the service of the Crown, and that such directions in the matter may be given as the Court may think fit."

The motion, after adjournment, came on for hearing on July 22, 1920.

Kerly K.C. and *Robert Frost* for the applicant. One question is whether "the Court" in s. 8 of the Act of 1919 is any judge of the High Court, or your Lordship as the Patent Judge specially selected by the Lord Chancellor under the Act of 1907. It is submitted that "the Court" means any judge of the High Court, and not the Special Judge.

[SARGANT J. That was my prima facie view on reading the Act. There are several places in it in which "the Court" is referred to. In one place it is undoubtedly the Special Judge. In another it is undoubtedly any judge of the High Court, because it says: "A judge who has tried a patent action." In four other places it is not quite clear, but generally speaking, I think "the Court" means any judge of the High Court.

Sir Gordon Hewart A.-G. (for the Crown) agreed that in s. 8 of the Act of 1919 "the Court" meant any judge of the High Court, and he referred to s. 92 of the Act of 1907, and s. 21 of the Act of 1919.]

The other question is whether s. 8 of the Act of 1919 is retrospective. The user of the inventions is admitted but the validity of the patents is not. In these circumstances there was a difficulty under s. 29 of the Act of 1907, and the Treasury's view that they could not try the question of validity suggested that the patentee might be without a

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remedy. Another view was that, if validity was denied by the Crown, the remedy was by petition of right. These questions were never decided, and s. 8 of the Act of 1919 has now been substituted for the old s. 29.

Much of s. 8 is new, and some of it affects the rights of both the Crown and the patentee, but the rest is procedure only.

By sub-s. (2.) of s. 8, where there is a dispute as to user, the matter is to be referred to the Court, which may refer the whole matter, or any question or issue of fact arising thereon, to a referee or arbitrator; and the Court, referee or arbitrator may "with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference and for the determination of the issues between the applicant and such Government department." It would be absurd to say that validity if disputed, could only be considered by consent, for the question of validity would be part of the dispute. Sub-s. (3.) shows that retrospective legislation was being made. If a dispute arises after s. 8 has come into operation, even as to user before that time, the section applies. And, even if the first words of sub-s. (2.) are strictly construed, there is a dispute as to user under this section if an earlier dispute is still continuing. The determination of the dispute is only procedure. "It is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure": *Gardner* v. *Lucas*. (1) Sect. 21 of the Act of 1919 also aids the contention that s. 8 is retrospective.

Sir Gordon Hewart A.-G. and *Austen-Cartmell* (*W. Trevor Watson* and *James Whitehead* with them) for the Crown. Sect. 8 of the new Act is not retrospective. Sect. 22, sub-s. (2.), after providing that certain sections other than s. 8 shall not come into operation until a certain time, says that "the provisions of this Act relating to the terms on which an invention . . . . can be made, and/or exercised by or on behalf

(1) (1878) 3 App. Cas. 582, 603.

of a Government department shall not come into operation until such time as may be fixed by order of the Board of Trade" (namely, April 23, 1920). That clearly refers to s. 8, which does not deal merely with procedure, but affects to some extent the positive rights of the subject, and, in at least one respect, the rights of the Crown by diminishing them. If that be so, in order to make s. 8 retrospective, there must be a clearly expressed intention to do so. Such an intention is clearly expressed in sub-s. (3.) in the words "and shall be deemed always to have included," but no such intention is expressed in any other part of s. 8, and the absence of such expression is significant as showing that where retrospective operation was to take effect, the Legislature was capable of saying so. Comparing s. 29 of 1907 with the substituted s. 8 of 1919, many differences are apparent. The terms of the proviso to the old s. 29 are curtailed against the Crown by the first proviso to sub-s. (1.) of the new enactment requiring the authority to be "in writing." The substitution of "make, use or exercise" for "use" may or may not be an amplification of the rights of the Crown.

The second proviso to sub-s. (1.) also makes an alteration, as under it a patentee may find himself with impaired rights because of something which has been done confidentially behind his back. Going back to sub-s. (3.) of s. 8, that expressly refers to "the right to use an invention for the service of the Crown" not only "under the provisions of this section" but also under "any provisions for which this section is substituted," thus showing plainly that the rights under the 1919 Act are, in some respects, different from the rights given by the 1907 Act. Returning to sub-s. (2.) of s. 8, the initial words are: "In case of any dispute as to the making, use or exercise of an invention under this section, or the terms thereof." That is equivalent to adding the tautological words "though not under any enactment for which this section is substituted." The power of the Court, referee, or arbitrator, by consent, to consider the question of validity, does not point to a decision, once for all, on validity, but to

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doing justice as between only the applicant and the Government department. If the inference which is submitted on the construction of s. 8 is, prima facie, correct, it cannot be displaced by the provisions as to printing and construction contained in s. 21 of the 1919 Act. The Stationery Office "may," not "must," issue copies of the Act of 1907 with the new enactments substituted for the old ones, but that does not create any retrospective operation.

Kerly K.C. in reply.

SARGANT J. In this case Mr. Frederick Marten Hale in 1918 presented to the Treasury a petition for the purpose of having his rights under s. 29 of the Patents and Designs Act, 1907, ascertained—for the purpose of the Treasury determining the terms on which the Government should be deemed to have used certain patented inventions of his. In that case the Treasury were not willing to admit either that he had valid patents or that the patents had been infringed, and the consequence was that, according to the settled practice of the Treasury, the application was not dealt with.

The Treasury, I think, had always felt that they were not a tribunal well adapted to decide complicated and legal questions such as are involved in determining the validity of a patent or sometimes the even more difficult issue of infringement. That being so, Mr. Hale moved before me in June, 1920, that the Court should decide the dispute between himself and the Treasury by virtue of the new legislation under the Patents and Designs Act, 1919. Sect. 8 of that Act varies to some extent the provisions of s. 29 of the Act of 1907, and substitutes "the Court" for the Treasury as the tribunal. The whole of the user in respect of which Mr. Hale is claiming is a user which took place before the coming into operation of the Act of 1919, s. 8 thereof having only come into operation by virtue of an order of the Board made under the provisions of s. 22, sub-s. (2.), on April 23, 1920.

On this motion I have to determine two questions of general importance. The first is whether the tribunal before which claims under s. 8 of the Act of 1919 are to be brought is the

tribunal mentioned in s. 92, sub-s. (1.) of the Act of 1907— that is to say, "the High Court in England"—or the Special Judge of the High Court selected by the Lord Chancellor under sub-s. (2.) of that section. Of course, I could entertain the application in either event inasmuch as I fill both capacities, and the question would only become vital in case an application of this kind were made to some other judge of the High Court of Justice; but as the matter has been mentioned, and as counsel are in agreement upon the question, and I am in agreement with them, I may as well state that in my view it is clear that "the Court" in s. 8 of the Act of 1919 is "the Court" as defined in s. 92 (1.) of the Act of 1907—namely, "the High Court in England," and therefore any judge of that Court has jurisdiction under s. 8.

The more important question before me is whether s. 8 of the Act of 1919 is retrospective in this sense, that it changes the tribunal for determining the matters in question as regards the user of patented inventions prior to April 23, 1920, or whether it changes the tribunal merely as regards user from and after that time. For that purpose s. 8 of the Act of 1919 has to be carefully compared with s. 29 of the Act of 1907, for which it has been substituted.

The first thing which strikes me on comparing the two sections is that s. 8 of the new Act does not merely alter the tribunal, but also alters in considerable respects the nature or terms of the rights of both the Crown and the patentee, for alteration of the rights of one is almost necessarily an alteration of the rights of the other.

Under the new section the user is perhaps slightly limited in this way, that it must be by "agents, contractors, or others authorised in writing" by a Government department, whereas no such words as "authorised in writing" occur in the old section.

On the other hand, in certain respects the right of the Crown is enlarged. I do not lay much stress on the fact that the Crown, under the new section, is to allow agents or others to "make, use or exercise" the inventions, whereas in the

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old section only the word "use" occurs. I am not sure whether that makes any considerable difference, but certainly the language has been extended, and I must attribute some importance to that extension. Furthermore, the second proviso to sub-s. (1.) of the new section makes a very important change, as it practically protects the Government in respect of its use of secret patents; it protects the Government where it has in fact recorded an invention which is the subject of a patent, though there may have been nothing equivalent to an actual user, but leaves the Government liable in cases where there has been a communication by the patentee in consequence of which that record has been made. My only comment on that proviso is that it is distinctly in favour of the Government.

By sub-s. (2.) of the new provision, as we have seen, the Court is substituted for the Treasury, and then sub-s. (3.) makes some important alterations. In the first place it provides that "the right to use an invention for the services of the Crown . . . . shall include . . . . the power to sell any articles made in pursuance of such right which are no longer required for the services of the Crown." That is an important modification of the respective rights of the parties—an increase of the rights of the Crown and a corresponding diminution of the rights of the patentee. And, reading words which I have so far omitted, the same sub-s. (3.) provides that this power to sell articles no longer required "shall be deemed always to have" belonged to the Crown—a special grant of a retrospective right in that particular case which seems to me to indicate forcibly that, where no retrospective right is expressly granted, there is no retrospective alteration of the rights of the parties.

No doubt the general law is that, while rights are not statutorily altered retrospectively, procedure is, apart from indications to the contrary, altered retrospectively; but where rights and procedure are dealt with together in the way in which s. 8 of the Act of 1919 deals with them, the intention of the Legislature would seem fairly clear—namely, that the old rights are still to be determined by

the old tribunal under the Act of 1907, and that only the new rights under the substituted section are to be dealt with by the tribunal thereby substituted for the Treasury. I think that is not the less so—although this alone would not cause me to come to the conclusion—because when the Act of 1919 was passed there was a tribunal—the Royal Commission on Awards to Inventors—which had been constituted by Royal Warrant and was dealing with part claims of this kind, no doubt only by the consent of the parties who had agreed to accept it in lieu of the Treasury, but still to a very large extent and by a definite course of sittings. That, I think, adds to the improbability which I derive from the language of the new section itself that the intention of the Legislature was, as regards the rights of inventors and others, to substitute a new tribunal not only to deal with the use of such inventions in the future, but to deal also, solely and exclusively, with the past use of those inventions.

Some reference has been made to s. 21, sub-s. (2.), of the Act of 1919, but I do not think that any assistance can be obtained in this case from a consideration of that provision, which may in some other respects have some very curious results that I need not attempt to foreshadow.

On the whole, I have come to the conclusion that the new tribunal substituted by s. 8 of the Act of 1919 is the tribunal which has to deal with all user after April 23, 1920, of patented inventions; and that the old tribunal is left to deal with claims in respect of user prior to that date, that old tribunal being the Treasury except where the parties consent to come before the other tribunal—the Royal Commission—before which they have an opportunity of appearing. No doubt the result in this case is unfortunate because the inventor, in common with other inventors the validity and infringement of whose patents are not admitted by the Treasury, is not in a position to have the compensation that ought to be paid to him determined unless and until he has established the validity and infringement of his patent before the ordinary tribunals of the country. But that has all along been the law from a

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period antecedent to the Act of 1907, and I do not think that that circumstance alone is sufficient to make me alter my view as to the meaning of s. 8 of the new Act.

Accordingly I refuse the motion. I have determined that the motion was properly made to me as a judge of the High Court, and not as the Special Patent Judge, and I think that the applicant is entitled to appeal from my decision. If any leave to appeal is necessary, I give it.

Solicitors: *Badham, Comins & Sloman; The Treasury Solicitor.*

F. E.

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WOLSTENHOLME *v.* AMALGAMATED MUSICIANS' UNION.

[1919. W. 1277.]

Trade Union—Expulsion of Member—Bringing Union into Discredit—Charges against Members of Branch Committee—Rules of Union—Construction.

On May 2, 1918, the plaintiff, who was a member of the Cardiff Branch of the defendant registered Trade Union, wrote a letter to the General Secretary of the Head Office saying that a large number of irregularities prevailed at the Branch Office, and making charges of serious misconduct against members of the Committee, in that they were accepting engagements at prices smaller than those charged to their own employer. As a result of this letter the Branch, after considerable correspondence and meetings, ultimately passed a resolution on January 5, 1919, expelling the plaintiff from the Union, as he refused to withdraw in writing the charges so made after disclaiming any intention to make any reflections on the Branch or its members, and promising to write to that effect.

Under Rule XVI. (3.) of the rules of the Union it was competent for any Branch, at a special or quarterly meeting, to fine, suspend, or expel any member from the Union, upon satisfactory proof being given that he had by his conduct "brought the Union into discredit."

In an action by the plaintiff against the Union for a declaration that the resolution expelling him was ultra vires and void, and for a consequential injunction:—

Held, that Rule XVI. (3.) must be read as an enabling one as well as one dealing with procedure, and that "bringing the Union into discredit"

meant bringing the Union, or any Branch of it, into discredit with the public, or any section of it, or with the other component parts of the whole organization.

Held, therefore, on the facts, that the conduct of the plaintiff afforded ample materials for the Branch to come to the conclusion to expel him, and the action failed.

WITNESS ACTION.

The plaintiff, Herbert Wolstenholme, was a baker and confectioner at Cardiff, and had been a member of the Amalgamated Musicians' Union.

The defendant Union was a Registered Trade Union and was established in 1893; there were about 18,000 members and over 100 branches. The plaintiff was at one time the Secretary of the Cardiff Branch of the defendant Union. He was a flautist and was employed by the Moss Empires, Ld., and by the Park Hall Cinema Company.

The contract of employment between him and Garforth Mortimer, the musical director of the Park Hall Cinema Company, was oral and commenced in October, 1918, on the terms of 2*l*. 10*s*. per week for playing at the Park Hall Cinema between 7 and 10; for trade shows 10*s*. each; and for concerts 1*l*. 1*s*. By this action the plaintiff claimed a declaration that a resolution of the Cardiff Branch of the defendant Union, passed on January 5, 1919, and purporting to expel him from the Union, was ultra vires and void, and an injunction to restrain the Union from acting upon it. The resolution of January 5, 1919, was in these terms: "That Bro. H. Wolstenholme having made unfounded charges involving officials of the Branch generally in his letter to G.O. (meaning thereby the General Office) of May 2, 1918, thereby causing dissension amongst the officials of the Union, has acted detrimental to the best interests of the Union, and be expelled." His name was accordingly erased from the list of members of the defendant Union as from that date. The plaintiff alleged that as a member of the said Union he had a proprietory interest in its funds of which he had been deprived, and also of all opportunity of earning his livelihood as a musician.

The letter of May 2, 1918, to the general office was as follows: "I beg to draw attention to matters at Cardiff

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which appear to me to be grossly unjust. A large number of irregularities prevailed, and with a view to bring them before the Branch as forcibly as possible, I tendered my resignation in October last. Although I know it was received by the Secretary, it has been ignored, and the first communication I have received was in February, five months later, with a statement for arrears. I replied stating that it was my earnest desire to be a member but I could not subscribe to the policy of inconsistency prevailing. I reminded them that the Cardiff Trades Council had instructed me to put 'Our own house in order.' On the Trade Union principle and in conformity with the Musical Hall award printed on the back of my Empire contract, I refused to accept a series of Sunday Concerts at 10*s.* while this calls on me to charge my regular employer 15*s.* for playing on Sunday evenings. I also refused to play at Trade Shows, in Cinemas, or other Halls, for less than I am called upon to charge my regular employer at the Empire. After the war, when there are more musicians than jobs, this kind of thing will be a serious menace to the A. M. U. Members of the Committee at that time were accepting engagements at Cinemas and other Halls for Trade Shows at 3*s.* 6*d.*, 4*s.* and 5*s.*, while charging their own employer at the Empire 7*s.* Now Moss Empires, Ld., have been more faithful to the A. M. U. than most employers, and I think it is both ungrateful and unjust that business should be driven away from them through the action of their musicians working cheaper for casual employers than they do for them. Kindly give this your serious attention and oblige. Yours truly, H. Wolstenholme."

A correspondence followed between Charles John Ariss, the Secretary of the Cardiff Branch, and the Head Office of the Union at Manchester in respect of the letter of May 2, and by letters of May 10 and 19, 1918, the Assistant Secretary at the Head Office wrote to C. J. Ariss as follows: "May 10. Your reply of May 9 re H. Wolstenholme's letter is simply an evasion. In that letter he makes some distinct charges against members of the Branch and Branch Committee, of under-cutting prices. These statements are either true or untrue. If they are true,

it is necessary the matter should be investigated and put right. If they are not true, it is quite easy to say so, but we cannot allow things of that kind to go unchallenged, especially when firms like Moss Empires are concerned, and then find the argument sprung on us perhaps by a manager at some future date. You do not appear to realise the seriousness of the statements, and how they may affect the welfare not only of yours but other Branches. Yours fraternally, E. S. Teale, Assistant Secretary." And on May 19: "Dear Sir & Bro. re Wolstenholme. Yours of the 18th to hand. I am not concerned with Wolstenholme himself, but with the good name of the Cardiff Branch members. Wolstenholme made certain statements which reflected on that good name. My only object was to give the members concerned the opportunity to clear their good name. If they and the Branch are content on a technical point to allow the stigma to remain, it does remain, and there is an end of the matter. Yours fraternally, E. S. Teale, Assistant Secretary."

At a Branch meeting on September 1, 1918, which the plaintiff attended and where his conduct was discussed, he stated that he did not wish by his letter of May 2 to cast any reflection on any individual member of the Union, and if any member thought so he "would write to the General Office at once and say so." The details of these meetings and of further meetings which were held and of the letters which passed relating to this matter sufficiently appear from the judgment of the Court. Ultimately the resolution for expulsion was passed. The rules of the Musicians' Union which the defendants relied upon as justifying their action in expelling the plaintiff, were Rules XVI. (3.) and Rule XXVIII. (2.). It was provided by Rule XVI. (3.): "It shall be competent for any branch at a special or quarterly meeting to fine (the amount not to exceed 2*l.*), suspend, or expel any member from the Union, upon satisfactory proof being given that such member has, by his conduct, brought the Union into discredit, or has fraudulently received or misapplied the funds of the Union, or the moneys of any member or candidate entrusted to him for payment to the Union."

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Rule XXVIII. (2.) enacted: "All charges made by one member against another must be made in writing, and if any charge on investigation turns out to be made through malice and without foundation, the member preferring such charge shall be liable to expulsion, or such other punishment as the case deserves. . . . . All charges against members shall be investigated by the branch to which the member charged belongs."

The main issue raised by the plaintiff was that he had not committed any offence which justified his expulsion under any of the rules, and there was no evidence of such an offence. Evidence was given by the plaintiff and by C. J. Ariss and others on behalf of the defendants, the result of which also sufficiently appears from the judgment.

Gover K.C. and *H. H. Slesser* for the plaintiff. The real question in this action is whether the plaintiff has been rightly expelled under the Rules of the Union. The two rules alleged to be applicable are Rule XVI. (3.) and Rule XXVIII. (2.). We submit that neither apply. Rule XVI. (3.) is a rule of procedure. The plaintiff expressly stated that he cast no reflection upon the Branch officers or the Committee, and cannot be guilty of conduct bringing the Union into discredit within that rule. It must mean discredit with the outside public: *Young* v. *Ladies' Imperial Club*. (1) This rule was never mentioned or discussed at the meeting at which he was expelled. Nor does his conduct come under Rule XXVIII. (2.), which is limited to charges made by one member against another and made through malice, and there is no proof of malice in this case. The proceedings taken were therefore invalid: *Labouchere* v. *Earl of Wharncliffe*. (2)

Disturnal K.C. and *P. M. Oliver* for the defendants. The plaintiff, by his letter of May 2, 1918, made serious charges of discreditable conduct against members of the Branch Committee, namely, of undercutting prices, and so brought the Union into discredit within the meaning of Rule XVI. (3.). There was evidence to support the conclusion arrived at by

(1) [1920] 2 K. B. 523. (2) (1879) 13 Ch. D. 346, 350.

the Branch, and we submit that it is not competent for the Court to determine whether an offence which justified this expulsion was committed or not. The plaintiff had every opportunity given to him to explain his conduct and withdraw his charges, and his failure to carry out his promise to write to the Head Office and withdraw the charges amply justified the resolution for his expulsion.

Gover K.C. in reply.

Patrick Hastings K.C. and *W. H. Draper* held watching briefs on behalf of the defendants in a second action by the same plaintiff.

Cur. adv. vult.

June 11. EVE J. The defendant Union was formed in 1893, and shortly afterwards the plaintiff was enrolled as a member. At that time he was living at Leigh in Lancashire. In 1899 he removed to Cardiff and in 1907 he formed the Cardiff Branch of the Society, of which he acted as Secretary from its formation down to the year 1910. In that year he resigned his membership of the Union, but rejoined again in 1916, and remained a member until January 5, 1919, when a resolution was passed purporting to expel him.

By this action he claims a declaration that the resolution I have just referred to was ultra vires of the Union, illegal, and void, as being unauthorized by the constitution of the Union, or by any of its rules, or by any of the provisions of the Trade Union Acts, and an injunction restraining the Union from acting upon or enforcing the resolution.

The grounds upon which the foregoing relief is claimed are stated in para. 4 of the Statement of Claim in these terms: "Neither the Executive Committee nor the Cardiff Branch had any inherent power to expel the plaintiff, nor had they at any time any evidence before them that the plaintiff had committed any offence coming under the rules empowering or justifying expulsion nor had he in fact committed any offence."

I construe para. 4 of the Statement of Claim as alleging (1.) that the only powers of expulsion possessed by the Union

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are such as are to be found in the rules, (2.) that the plaintiff had not committed any offence justifying his expulsion under any rule, and, (3.) that there was no evidence upon which the Union was justified in coming to the conclusion that he had committed any such offence.

The first of these allegations is not disputed—it is admitted that the power to expel must be found in the rules, and does not exist apart from them. As regards the second and third allegations it is asserted that the plaintiff did commit an offence justifying expulsion, and that there was abundant evidence of the fact to support the action taken. It is, however, submitted that if there was in fact evidence to support the conclusion at which the Union arrived it is not competent for this Court to determine whether an offence justifying expulsion was or was not committed.

I think this latter submission is well founded, and that the real issue which I have to decide in this action is whether there was evidence before the Union of an offence committed by the plaintiff for which under the rules he could be expelled.

What then is the offence on which the Union relies? It is the writing of a letter which it is contended according to its true and natural construction contains charges of misconduct against other members of the Union, and the persistent refusal to withdraw in writing the charges so made even after a disclaimer by the plaintiff of any intention to make such charges and a promise by him to write and say that he had never intended by his first letter to make any reflections on the Cardiff Branch or the members thereof.

An attitude such as this, is—it is urged—either conduct calculated to bring discredit on the Union, or, alternatively, the making of malicious and false charges against fellow members, offences for which it is argued expulsion is the appropriate punishment under Rules XVI. (3.) and Rule XXVIII. (2.) respectively.

The letter referred to is dated May 2, 1918, and the circumstances in which it came to be written are these. The plaintiff took exception to certain figures in the scale of prices adopted by the Branch in August, 1917, and in September or October

tendered his resignation as a member, not with any serious intention of withdrawing from the Union, but in the hope that his action might lead to a revision of the price list in accordance with his views. This hope was not realized, the resignation was not accepted, and at or about the date of the letter the plaintiff, in order to avoid forfeiting his membership for non-payment of subscription and fines, paid up all arrears and wrote the letter to the General Secretary of the Union at the head office in Manchester. It is in these terms [His Lordship read the letter and continued :] It is not necessary to enter into the merits of the differences between the plaintiff and the other members of the Branch, but it is, in my opinion, impossible to construe this letter solely as a criticism of the policy of the majority—it contains serious personal charges against members of the Committee, and that it was so read and construed is clear from the communications which followed between the officials at the Head Office and Mr. Ariss, the Branch Secretary. The attitude of the Head Office is well illustrated in two letters of May 10 and 19 from the Assistant Secretary written in reply to communications from Mr. Ariss, wherein he alludes to the vagueness of the statements in the plaintiff's letter and points out and insists that the matters therein dealt with ought to have been reported to the Local Secretary and not to the Head Office. The letters of May 10 and 19 are in these terms [His Lordship read the letters and continued :] It is therefore quite clear that at the Head Office of the Union the plaintiff's letter was treated as containing charges of discreditable conduct on the part of some members of the Union and as reflecting on the good name of the Branch, and I agree in that construction of it.

The result of the correspondence between the Head Office and the Branch was that on June 10 the plaintiff was requested by the Committee of the Branch to furnish them in writing within fourteen days with specific details of the alleged irregularities. This he neglected to do, and on July 13 the request was repeated and an invitation was given to the plaintiff to attend a meeting of the Committee on September 1. To this the plaintiff replied, offering to attend a meeting of

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the Branch and adding "my criticism is of policy not of individuals."

The Branch Meeting was held on September 1, 1919, and was attended by the plaintiff. His letter of May 2, 1918, was discussed, and his own evidence of what followed is in these words: "I gave them what I considered a true interpretation of my letter. I said I did not wish to cast any reflection on any individual member of this Union. . . . . I cast no reflection on them whatever, but if any member thought or felt that my letter had cast a reflection on them I would write to the General Office at once and say so." And in cross-examination: "I said I was willing to write to the General Office and say there was no reflection on the Branch whatever or on any of the members." Thereupon a motion was moved, seconded and passed unanimously, that "a Minute be entered to that effect," and the Secretary there and then wrote out the following Minute: "After a long discussion of Bro. Wolstenholme's letter to G.O. it was proposed by Bro. T. Johnson, seconded by Bro. P. Edwards, and resolved that a Minute be entered to the effect that the matter re Bro. Wolstenholme was discussed, and Bro. Wolstenholme offered to write General Office saying there is no stigma on the Branch, etc., and that his letter was only a criticism." There is a conflict of evidence whether this Minute was read over to the plaintiff at that meeting or not, but I do not pause to examine the evidence on this point as it is not very material. I am quite satisfied from the plaintiff's own evidence that the meeting treated the incident as closed by his promise to write to the Head Office and that no one regarded the promise as conditional upon any further request being made to the plaintiff. The Minute, in my opinion, correctly records what took place, and I am quite unable to reconcile the plaintiff's subsequent attitude with the account he himself gave of the proceedings which culminated in the resolution it embodies.

The plaintiff failed to redeem his promise of September 1, and the matter having been brought to the attention of the Executive Committee of the Union in October the General

Secretary was instructed to write to the plaintiff calling on him "to withdraw his charges as he has promised." This was done on October 15 and 21, and on the 24th the plaintiff replied in a letter of which the concluding paragraph reads: "I have not withdrawn anything nor expressed regret for anything I have said. The statement is a pure invention, and I ask you to be good enough to say who is responsible for same."

It is impossible, I think, to feel any surprise that the members of the Branch treated the plaintiff's conduct as a repudiation of the promise made on September 1, and the position thereby brought about as one calling for prompt and drastic action. He himself admits that in the concluding sentence of the letter, from which I have just quoted, he was referring to his offer of September 1. At the November meetings of the Committee and Branch the correspondence was read, and the matter discussed, and at the latter it was resolved "that the Secretary instruct Bro. Wolstenholme to attend next Branch Meeting to give reasons, if any, why he should not be expelled as an undesirable member for recent actions." The next meeting was held on December 1, and was attended by the plaintiff, who had previously been informed that the charge made against him was one "of conduct detrimental to the interests of the Union." At the meeting the plaintiff assumed an ignorance of the charge brought against him and complained that he had not been supplied with a copy of the Minute of the proceedings of September 1. I say "assumed ignorance" because in his cross-examination at the trial he says: "I knew the letters of November the 10th and 22nd" (those were the letters from the Secretary requesting him to attend on December 1, and informing him of the purpose for which his attendance was requested) "referred to my letter of the 2nd of May. I knew the Branch was making a charge against me for writing a letter of the 2nd May—for writing a letter containing charges against the officials. On the 1st December I stated the Minute of the 1st September was not in accordance with my statement. I knew on the 1st December that I could dispose of the whole matter by writing to the G.O. as I had promised.

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That is what they were requiring, and it might have disposed of the whole matter."

It is quite clear from these extracts that the plaintiff fully appreciated the position, but the Chairman of the meeting thinking there might be some technical grounds to support the objection that a copy of the Minute of September 1 ought to have been supplied, invited the meeting to let the matter stand over, and a resolution was accordingly passed that a copy of the resolution of September 1 be sent to the plaintiff. I do not accept the plaintiff's evidence as to what was said by the Chairman when he gave his ruling on the objection. The plaintiff was not an altogether satisfactory witness, and on the points where his testimony is in conflict with that of Mr. Ariss and others, I accept the latter as more reliable. It is, however, right to add that the relevant points of difference are not many, and most of them may well be attributed to lapses of memory or a mistaken apprehension of what really was said in the course of lengthy and occasionally somewhat heated discussions.

The final and all-important meeting was held on January 5. In the interim the plaintiff had been supplied with a copy of the resolution of September 1, and had embarked on a correspondence on matters in no way relevant to the dispute between him and the other members, and calculated to aggravate rather than diminish the existing position. Indeed at the Committee Meeting which preceded the General Meeting, the Secretary had notified his intention of resigning his office in consequence of the plaintiff's conduct, and had only been induced to withdraw the notice on the assurance that a motion for the expulsion of the plaintiff would be moved at the General Meeting. There can be no doubt that the plaintiff and the members generally fully appreciated that the meeting would be called upon to deal with the dispute between the plaintiff and the Branch. The matter had been under discussion for several months, and at each of the previous meetings in November and December the question of the expulsion of the plaintiff had been debated. The matter was notorious amongst the members, and the plaintiff himself stated in evidence that he

"went to this meeting for the express purpose of getting the charge against me withdrawn or proceeded with so that it might be dealt with." I am satisfied that all parties realized that this meeting was to determine the question at issue between the plaintiff and his fellow members. The plaintiff, according to his own evidence, began the discussion by intervening when the Minutes of the previous meeting were being read by asking the question whether the charge then preferred against him was to be proceeded with or withdrawn. The answer to this was the moving and seconding of a resolution for his expulsion, and the Chairman, in the course of a statement of all the facts, said that if the plaintiff had only done what he had promised on September 1, the whole matter would have been at an end, but that it had now come to this, that either Ariss or the plaintiff had to go. At the conclusion of the Chairman's address the plaintiff was asked if he had anything to say; he made no reply, and was asked to withdraw while the vote was taken. The following is the resolution which was thereupon unanimously passed [His Lordship read the resolution of January 5, 1919.] I think the evidence given by Mr. Ariss in cross-examination accurately stated the grounds on which the resolution was based. He says: "I was primarily responsible for framing the charge on which the plaintiff was expelled. I wrote it out. He was expelled because he had not written this letter. I mean the letter he offered to write to the G.O. That is the reason as understood by everybody. The stigma was that members of the Committee had been undercutting the Branch prices. That was a stigma on the Branch, and the one to which I referred in the Minute. I think that was understood throughout. The whole letter was wrong, but that was the worst part of it."

Such are the salient facts of the case, and the question I now have to consider is whether there is any rule justifying the plaintiff's expulsion. It is admitted that the particular rule under which he was being expelled was never discussed at all, but this is immaterial if there be in fact a rule justifying what was done, and Mr. Ariss in his evidence says: "We acted under

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Rule XVI. (3.); it was thought he was liable to expulsion under two rules, that one and Rule XXVIII. (2.) "

I do not think any case is made out under the latter of these rules. Assuming that the charges in the letter of May 2, supplemented by the oral addition of individual names on September 1, were charges within that rule and were without foundation, I do not think there are any materials on which I could hold them to have been shown to be malicious or made through malice, and proof of malice is a necessary ingredient before the power to expel under the first sentence of this rule arises.

The result is that the action of the defendants must be justified, if at all, by the earlier rule. The rule is in these terms, Rule XVI. (3.) [His Lordship read the rule.] There is no doubt that rule reiterates grounds for expulsion which are specifically provided for in other rules—e.g., fraudulent misapplication of funds in Rule XXII. (8.) and Rule XXVI. (1.) and (10.), and misapplication of moneys of any member or candidate intrusted for payment to the Union in Rule XXVI. (8.) and (9.), and it may perhaps truthfully be said that the other cases for expulsion dealt with in specific rules—such, for example, as the expulsion of the Secretary under Rule XI. (7.) and of him or any other officer under Rule XXII. (8.)—are conveniently summarized as conduct bringing the Union into discredit.

Upon this critical analysis of the rule and upon its position in the Book of Rules and the subject-matter with which it mainly deals, an argument was put forward on behalf of the plaintiff that the rule ought to be construed as one of procedure only—as one which vests in the Branch a power to expel on any of the grounds for which expulsion is the penalty but which does not in itself confer any power to expel upon grounds other than those mentioned in the specific rules to which I have just referred.

I do not think I should be doing right in so restricting the language of the rule. It is true that treated as an enabling rule, some of its language—as in not a few other cases in the Book of Rules—may be tautological, but, on the other hand,

to restrict it to procedure involves the imposition of a very strained construction on the sentence dealing with conduct bringing the Union into discredit, and provokes the inquiry why the draftsman—if he intended the rule to extend to all cases of expulsion provided for in the rules—did not say so instead of specifying certain grounds and leaving the others to be deduced from the reference to conduct bringing the Union into discredit—and not the less so because the specifically mentioned grounds would appear to be quite as much calculated to bring discredit on the Union as those which it is suggested are compendiously dealt with by the phrase "conduct bringing the Union into discredit."

I think I ought to read the rule as an enabling one as well as one dealing with procedure, and this brings me to the final question I have to consider, and that is whether there was evidence on which it could be found that the plaintiff had been satisfactorily proved by his conduct to have brought the Union into discredit. What is the meaning to be attached to this phrase? It cannot in an organization of this nature with its Head Office in Manchester and Branches in cities and towns all over the country, mean that the conduct must be such as to bring the whole Union into discredit. It is obvious there might be conduct discrediting one Branch and in no way affecting the Head Office or any other Branch. "Bringing the Union into discredit" must, therefore, mean the Union, or any Branch of it. Any other construction would impose on the Branch seeking to exercise this power of expulsion the impossible task of obtaining satisfactory proof that the conduct had brought the whole Union into discredit. Moreover, the distributive construction is consonant with the fact that the exercise of this power is vested in each branch.

The next question is, Bring it into discredit with whom? The plaintiff says: "The outside public, and in particular that part of it which has business or professional relations with members of the Union." I agree, but why should it be restricted to this class? Is it not equally important that the credit of the Branch should be maintained with the Head Office and the other branches? I think it must be, and that conduct

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which has brought discredit on the Branch with the public, or any section of it, or with the other component parts of the whole organization comes within the rule.

On this footing is it possible to assert that the members of this particular Branch had not in the plaintiff's original letter—alleging, as I have held it does, misconduct of a discreditable character on the part of members of the Committee—in the attitude assumed and persisted in by the Head Office towards the Branch in consequence of that letter, and in the plaintiff's persistent refusal to redeem his promise of September 1, evidence on which it was competent for them to hold that the plaintiff had been satisfactorily proved by his conduct to have brought the Branch into discredit? I do not think it is—on the contrary, I think there were ample materials on which it was open to the Branch to come to the conclusion they did come to, and I cannot give the plaintiff the relief he asks in this action. In dismissing it with costs I can only express my surprise and regret that the plaintiff did not see fit to avert the serious consequences which have followed his expulsion by accepting one or other of the offers made to him even after the resolution had been passed to reconsider the whole matter if he would first redeem his promise of September 1.

Solicitors: *Pritchard, Englefield & Co., for W. B. Francis & Cooke, Cardiff; Hall, Hawkins, Pimblott, Brydon & Chapman.*

G. M.

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April 28, 29, 30; *June* 11.

[1919. W. 1278.]

Trade Union—Musician and Employer—Expulsion from Union—Committee of Branch—Coercion and Threats—Inducement to Employer to break Contract—Refusal to work with expelled Member—Notification to Employer.

Inducement not to continue an employment is illegal only if it is exercised by illegal means.

A Branch of a Musicians' Trade Union having expelled the plaintiff from the Union passed a resolution on February 2, 1919, that as the plaintiff was now a non-member of the Union the members of the Branch would not, after March 3, 1919, play with him, and any member so doing would be treated as a non-member. On February 7, 1919, the passing of this resolution was notified by the Secretary of the Branch to the manager and also to the musical director of the cinema where the plaintiff was employed. The enforcement of this resolution was suspended during correspondence and further meetings, and ultimately, on April 21, 1919, the Secretary of the Branch wrote to inform the plaintiff's employer that the resolution of February 2 would be acted upon, whereupon the plaintiff, who had on February 15, 1919, received from his employer a fortnight's notice of dismissal, was instantly dismissed.

In an action by the plaintiff against the Secretary and members of the Branch Committee alleging threats and coercion by them and asking for an injunction to restrain them from individually or collectively interfering with his right to dispose of his labour as he would :—

Held, that the simple notification to the employer of an intention to do a lawful act, or lawful acts, whether on behalf of an individual or of a number of persons, could not properly be described as the use of illegal means against the person employed, and the action failed.

WITNESS ACTION.

This second action was brought by the same plaintiff, H. Wolstenholme, against Charles John Ariss, the Secretary, and all the members of the committee of the Cardiff Branch of the Amalgamated Musicians' Union, alleging that they had severally and acting in combination amongst themselves during February, 1919, and until April 22, 1919, by unlawful threats, coercion and pressure compelled the plaintiff's employer to break his contract with the plaintiff on April 22, 1919, and to dismiss him, or refuse to employ him any longer; and the plaintiff claimed an injunction

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to restrain the defendants, individually or collectively, from interfering in combination or otherwise with the right of the plaintiff to dispose of his labour as he would.

The evidence in the first action, which was agreed to be treated as given in this case also, brought matters down to the date of the plaintiff's expulsion from the union on January 5, 1919.

On February 2, 1919, at the ordinary general monthly meeting of the branch, a resolution was passed in these terms : " As Mr. Wolstenholme has now been expelled and is now a non-member we the members of this branch resolve that on and after Monday, March 3, 1919, we will not play with him, and any member playing with him after above date will be treated as a non-member." On February 7 the passing of this resolution was notified by the defendant, Mr. Ariss, as Branch Secretary, to Mr. Fooks the manager, and to Mr. Garforth Mortimer the musical director of the Park Hall Cinema where the plaintiff was at that time employed and each letter concluded with the words, " Please note that after above date our members will refuse to play with Mr. H. Wolstenholme." On February 15 Mr. Mortimer, on behalf of his principal, gave the plaintiff a fortnight's notice to terminate his engagement. Such notice would expire on March 1—two days before the date on which the resolution became effective.

At the time this notice was given Mr. Mortimer, himself a member of the Union, had already intervened with a view to bringing about a reconciliation between the plaintiff and the Union, and the result of his efforts was that the coming into operation of the resolution of February 2 was from time to time suspended.

On April 6, 1919, a General Meeting of the Cardiff Branch was held which Mr. Williams, the General Secretary of the Union, attended, and Mr. Mortimer was present on behalf of himself and the plaintiff. The whole position was discussed, and the General Secretary intimated that if, at that eleventh hour, the plaintiff would carry out his promise to the Branch to write to the General Office to say that he intended no

reflection on the Branch or any of its members the whole matter would be wiped out and forgotten. It was ultimately resolved that if the plaintiff, within seven days, carried out his promise as referred to in the resolution of September 1 passed by the Branch, the resolution for his expulsion would be reconsidered. This was communicated to the plaintiff, who wrote to Mr. Mortimer to say that the matter was in the hands of his solicitors, and the promised letter to the General Office was never written. Finally, on April 21, 1919, Mr. Ariss wrote to Mr. Mortimer as follows: "G. Mortimer, Esq., Musical Director, Park Hall Cinema, Cardiff. Dear Sir and Brother, The period of grace granted to Mr. H. Wolstenholme has now expired, and as he has not carried out the expressed desire of the Branch Meeting in accordance with the resolution passed by the Branch at the meeting held on April 6, the members of the Branch will act up to the resolution passed on February 2, and will refuse to play with him on and after this date, April 21, 1919. Yours fraternally, Charles Ariss." Mr. Mortimer thereupon gave the plaintiff notice of instant dismissal.

The defendants denied the allegations of the use of unlawful threats, coercion or pressure or of having procured the breaking by Mr Mortimer of his contract with the plaintiff, and submitted that no action would lie against the defendants as members of the Branch, or personally, with respect to any of the matters complained of, and that the action was misconceived and should be dismissed.

Gover K.C. and *H. H. Slesser* for the plaintiff. We claim relief against the officials of the Cardiff Branch similar to that claimed in *Valentine* v. *Hyde*. (1) The interference we complain of was in the combination or otherwise of the defendants which prevented the plaintiff from disposing of his labour as he chose. They induced his employer, Mr. Mortimer, to break his contract with the plaintiff and to cease employing him. We submit these propositions: (1.) If an individual induces another to break his contract with a third person

(1) [1919] 2 Ch. 129.

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that breach, being in fact and law an illegal act in itself, causes the committal of an actionable wrong by the first person; (2.) Where an individual in combination with others does the same thing, there is an a fortiori case; (3.) If an individual induces the non-employment, or the non-entry into a contract, or the termination of a contract, that might under certain circumstances amount to an actionable wrong, and if induced by threats or coercion it would certainly be actionable; (4.) Where the act induced is not a breach of contract, but is committed in combination, it is an actionable wrong even without proof of coercion or threats. The present case comes within all these propositions. The pressure, coercion, and moral intimidation lie in the resolution of February 2, 1919, and the communication of it which was passed on through the defendant Ariss to Mr. Fooks and Mr. Mortimer, and resulted in the immediate dismissal of the plaintiff on April 21. He has been ever since precluded from practising as a musician at all. No case arises here under the Trades Disputes Act, 1906. The cases bearing on the point are *Allen* v. *Flood* (1); *Quinn* v. *Leathem* (2); *Pratt* v. *British Medical Association* (3); *Giblan* v. *National Amalgamated Labourers' Union.* (4) *Hodges* v. *Webb* (5) is distinguishable and was a decision under the Trades Disputes Act, 1906. In *Santen* v. *Busnach* (6) there was a combination of employees. The most recent cases are *Davies* v. *Thomas* (7) and *White* v. *Riley and Wood.* (8) On the whole facts there has been moral intimidation procuring the breaking of the contract.

Patrick Hastings K.C. and *W. H. Draper* for the defendants. In the end this case, like most of the other cases on this point, comes back to a question of fact: (1.) whether there was a conspiracy or unlawful combination to do a lawful act by unlawful means that is by means of threats, coercion, and

(1) [1898] A. C. 1.
(2) [1901] A. C. 495.
(3) [1919] 1 K. B. 244.
(4) [1903] 2 K. B. 600.
(5) Ante, p. 70.
(6) (1913) 29 Times L. R. 214.
(7) [1920] 1 Ch. 217; [1920] 2 Ch. 189.
(8) (1920) 36 Times L. R. 566.

pressure, with the object of compelling the employer to dismiss the plaintiff; and (2.) did the defendants procure the breaking of the contract by Mr. Mortimer. We submit there was no unlawful act, no threats, and no coercion.

There is a distinction between a warning and a threat. It is difficult to reconcile all the cases on the subject. If *Valentine* v. *Hyde* (1) and *White* v. *Riley and Wood* (2) went further than the other cases on this point we submit they were wrongly decided. No illegal act has been done. The plaintiff was rightly expelled from the Union, and the other members were within their rights in saying they would not work with him. The defendant Ariss was also entitled to notify to Mr. Mortimer the determination of the members of the Branch so to do. The letters of February 7, 1919, cannot be considered as threats or coercion. They announced the resolution of the Committee of the Branch. That is the only possible approach to evidence of a threat. But we submit that there was no unlawful act, and no illegal means used. The narrow but important point is here raised whether the Union was justified in law in conveying to the employer the fact that the members of the Union would carry out the resolution of the Branch. That is the only issue in this case. The remarks of Stirling L.J. in *Giblan's Case* (3) are important.

Gover K.C. in reply. There was here an actionable conspiracy or combination to do unlawful acts and also to do what might be, under certain circumstances, lawful acts, by illegal means.

Cur. adv. vult.

June 11. EVE J. (after stating the plaintiff's allegations and claim in the action continued:) The questions I have to decide are primarily of fact: did the defendants, or any of them, by threats, coercion, and pressure, procure and compel the plaintiff's employer, (*a*) to break his contract with the plaintiff, or (*b*) to refuse to employ him any longer?

(1) [1919] 2 Ch. 129. (2) 36 Times L. R. 566.
(3) [1903] 2 K. B. 600, 622.

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[His Lordship stated the facts that took place after January 5, 1919, when the resolution excluding the plaintiff was passed, and continued :] On the evidence this action involved no breach of contract on the part of the employer. The engagement pleaded was, I think, a weekly one, but even assuming it was a seasonal one it was proved to be subject to determination by a fortnight's notice. I do not think it is necessary to go in detail through the various attempts made by Mr. Mortimer to adjust matters between the plaintiff and the Union. Enough, I think, to say that Mr. Mortimer, although he succeeded in getting the Union to suspend the operation of the resolution not to play with the plaintiff, he never withdrew the notice of February 15, and it would, I think, be shutting one's eyes to the whole course of events between that date and April 21 to hold that the notice had been withdrawn and that Mortimer was exposing his employer to an action for breach of contract in the event of his efforts to bring the plaintiff and the Union into accord resulting in failure and the resolution of February 2 thereupon becoming effective. In my opinion there was no breach of contract on the part of the plaintiff's employer ; the notice to determine the employment was never withdrawn, its operation was suspended until the result of Mortimer's efforts was known, and when they failed the notice became simultaneously operative. I cannot, therefore, hold the plaintiff to have established that the defendants procured or compelled his employer to break his contract with the plaintiff.

There is no doubt that it was in consequence of the action of the Union, that is to say of the members of this Branch of the Union present at the meeting of February 2, that the employer refused to employ the plaintiff any longer, but this obvious conclusion does not, in itself, entitle the plaintiff to relief in this action. The members were quite within their rights in refusing to play with the plaintiff, and no action could lie against them or any of them for so doing. What the plaintiff has sought to establish is that in the assertion of that right they have threatened and coerced his employer into

refusing further to employ him. I find it very difficult to lay my finger on any act which can fairly be described as a threat or as coercive.

It was argued strenuously that the passing of the resolution of February 2 was, in itself, an agreement or combination by the members who passed it to do an illegal act in that they thereby resolved that any member playing with the plaintiff after the date therein mentioned should be treated as a non-member.

I confess that I cannot follow this argument. If, by the constitution of the Union, a member loses his rights as such by playing with a non-member the resolution is only a reminder of the fact: if, on the other hand, no such penalty attaches this resolution is quite inoperative to impose it; at most it is but the expression of an intention on the part of those who support it so to treat members who disregard the earlier part of the resolution. And in so resolving the members were again acting within their rights.

This, then, being the position, the defendants having resolved to adopt a line of conduct towards the plaintiff and any of their fellow members who might continue to play with him, which they were lawfully entitled to adopt, what is it that the plaintiff has to establish before he can maintain this action? He must prove that in order to procure their object they have resorted to threats, coercion or other illegal means. Inducement not to continue an employment is illegal only if it is exercised by the use of illegal means. If authority is required for this proposition it is to be found in Lord Watson's speech in *Allen* v. *Flood* (1), where he says: "There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequence. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful so far as he is concerned, it may yet be to the detriment

(1) [1898] A. C. 1, 96.

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of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (1), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party." What then are the illegal means which the plaintiff alleges were used by the defendants to carry out what were legal acts in themselves? In substance it was the communication on February 7 to the plaintiff's employer and to Mr. Mortimer of the terms of the resolution of February 2. How can this possibly be treated as a use of illegal means? Can a simple notification to the employer of an intention to do a lawful act or lawful acts, whether it be a notification on behalf of an individual or on behalf of a number of persons, properly be described as the use of illegal means against the plaintiff? I do not think it can. There may, of course, be cases in which threats, coercion or pressure may be found to have been employed without any threats being actually put into words, but in this case I am relieved from any inquiry whether there was conduct capable of being so interpreted because it is admitted that, apart from the passing of the resolution and the communication of it to the employer and to Mr. Mortimer, there was no threat, coercion or pressure.

In these circumstances I come to the conclusion that the plaintiff has failed to establish any cause of action against the defendants, or any of them, and I can only dismiss this action also with costs.

Solicitors: *Pritchard, Englefield & Co., for Francis & Cooke, Cardiff; Hall, Hawkins, Pimblott, Brydon & Chapman.*

(1) (1853) 2 E. & B. 216.

G. M.

COOPE *v.* RIDOUT.

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1920
July 1, 2.

[1920. C. 139.]

Specific Performance—Conditional Offer—"Subject to title and contract"—Agreed Terms embodied in Draft Contract—Approval by Vendor—Absence of formal written Agreement inter partes—No enforceable Contract.

Purchasers made an offer to a vendor to purchase his freehold property at a specified sum "subject to title and contract." The purchasers alleged that all the material terms were subsequently agreed between the parties at an interview and by letters, and were embodied by the purchasers in a draft contract which the vendor returned unaltered with the words "It seems to be all in order." The vendor having refused to complete, the purchasers brought an action for specific performance of the contract contained in the draft:—

Held, that even assuming that all the terms of the agreement had been settled one by one and embodied in the draft, the condition contained in the offer required that a written contract made inter partes should be formally entered into, and in the absence of such a document there was no enforceable contract.

Winn v. *Bull* (1877) 7 Ch. D. 29, 32, and *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, 288 applied.

WITNESS ACTION.

The defendant, Charles E. Ridout, was entitled in fee simple to a dwelling house, land, and premises at Lyndhurst, in the county of Hants, known as the Park Hill Estate. The plaintiffs, Edward Jesser Coope and Edward Thomas Mashiter, were the trustees of the marriage settlement of Mrs. Gertrude Fulcher who was, in the month of August, 1919, in occupation of the said premises as tenant thereof under a lease expiring on February 2, 1920, at a rental of 450*l.* a year.

In August, 1919, Mrs. Fulcher requested the plaintiffs to purchase the freehold of the said premises out of moneys in her settlement available for that purpose, and on August 16, 1919, Messrs. Fellowes & Co., the plaintiffs' solicitors, wrote to the defendant a letter saying that they understood that he was willing to sell the freehold of this property and concluding as follows: "We are instructed on behalf of clients of ours to make an offer of 12,000*l.* for the property, subject to title

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and contract. Completion to be on September 29 next. As the time is somewhat short we should be glad to hear from you with the least loss of time possible whether the offer we make is acceptable; it represents 27 years' purchase on the rental value." This was replied to by the defendant on September 2, 1919, to the effect that he might possibly be prepared to accept the offer for his property though he had given a good deal more than 12,000*l.* for the place.

On September 5, 1919, there was an interview between Mr. E. N. Fellowes as the plaintiffs' agent and the defendant at which the parties, as the plaintiffs alleged, agreed verbally to the price of 12,000*l.* for the Park Hill Estate, subject to an arrangement being come to as to the removal by the defendant of certain furniture, and to the purchasers taking over certain fixtures at a valuation; and the date for completion was altered to February 2, 1920. By subsequent correspondence arrangements were come to on the two questions of the disposal of the furniture and the purchase of the fixtures at a valuation. In one of these letters dated October 16, 1919, written by Mr. E. N. Fellowes to the defendant, he said: "I think a formal contract for sale should be drawn up and signed by yourself and my clients and completion be fixed for February 2 at the termination of the lease." After further correspondence Mr. E. N. Fellowes embodied all the agreed terms which had been come to between the parties in a draft contract, and on November 19, 1919, he wrote to the defendant saying: "I enclose herewith the draft of a contract which I have prepared . . . . and I should be glad if you will look through it and return it to us with any comments and additions you may think advisable. As I do not know the title to the property I have, as you will see, provided that the title to be deduced shall be the same as that deduced to the present mortgagees of the property." On December 2, 1919, the defendant replied returning the draft, and saying, "It seems to be all in order." No question as to the price was raised in any letter by the defendant. Meanwhile Sir Stephen Leech had been permitted to view the property and offered the defendant 13,000*l.* for it.

On December 11, 1919, the defendant wrote to Mr. Fellowes stating this fact and saying that he had told Sir S. Leech that he was doubtful whether he was still in a position to sell it to him as matters had gone some way, though not completed. He added: "Is it too late to ask if your clients would give me 13,000*l.* instead of 12,000*l.* or release me?" It appeared from another letter that there was a mortgage on the property for 12,000*l.* and that the defendant had originally given 16,000*l.* for the property. The plaintiffs, having refused to increase the price, or to release the defendant, the latter, through his solicitors, declined to carry out the sale or execute the engrossment sent to him. The plaintiffs then commenced their action on January 15, 1920, and claimed specific performance of the agreement to sell them the Park Hill Estate and damages. The defence was a denial of any binding and concluded agreement until engrossments had been executed by both parties.

Tomlin K.C. and *Bryan Farrer* for the plaintiffs. The question is whether there was a concluded agreement come to by letters and at the interview. The fact that a formal contract is suggested does not diminish the existence of the contract: *Rossiter* v. *Miller*. (1) There was a consensus here between the parties as to the terms before the draft contract was sent on November 19, and in any case after the return of the draft contract unaltered and approved by the defendant on December 2, it is not open to him to say that there was no concluded bargain.

[EVE J. referred to *Winn* v. *Bull*. (2)]

In that case the agreement was made subject to the preparation and approval of a formal contract. Here it is only "subject to title and contract": Fry on Specific Performance, 5th ed., p. 279; *Perry* v. *Suffields, Ld.* (3) The conditions in the original offer were all fulfilled, the price of 12,000*l.* was never dissented from in any of the defendant's letters from beginning to end. The words "subject to contract"

(1) (1878) 3 App. Cas. 1124, 1151.
(2) 7 Ch. D. 29.
(3) [1916] 2 Ch. 187.

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may refer either to a contract arrived at by letters, or to a signed contract. All the essential terms were in fact embodied in the draft contract, and the approval by the defendant is equivalent to his signing it. What the defendant thought or intended does not matter once it is established that he had in fact entered into a legal contract.

Maugham K.C. and *A. Adams* for the defendant. There has been no agreement come to by which both parties intended to be bound: *Huddleston* v. *Briscoe.* (1)

Approval of a draft is not equivalent to signing a contract. The parties were merely negotiating on the footing that there was to be a contract and they were not to be bound until both parties had signed the final engrossed agreement. That was the intention throughout. Even if the defendant had agreed to every essential term, there would still be no contract until those terms were reduced into writing and signed: *Ridgway* v. *Wharton* (2), where the true view to be drawn from correspondence is stated by Lord Chancellor Cranworth. In *Doe* v. *Pedgriph* (3) the words "we approve of this draft" written on the back of a draft agreement and signed by the parties were held not to import an agreement, as if they did there would never be any necessity for any other instrument. So also in *Foligno* v. *Martin* (4), where a draft contract was approved by M., who subsequently objected to it and refused to join in a purchase. Lord Romilly held that there was no evidence that M. had entered into any agreement. Similarly an approval of a mere draft by a solicitor or by parties is not sufficient to constitute a contract.

Rossiter v. *Miller* (5) which is relied upon by the plaintiff is in our favour, and *Von Hatzfeldt-Wildenburg* v. *Alexander* (6) also applies. Here it was all negotiation until the formal document had been executed between the parties.

Tomlin K.C. in reply. The only condition was that the parties should agree to all the necessary and material terms cardinal and auxiliary and that was done when the draft

(1) (1805) 11 Ves. 583.
(2) (1857) 6 H. L. C. 238.
(3) (1830) 4 Car. & P. 312.
(4) (1852) 22 L. J. (Ch.) 502.
(5) 3 App. Cas. 1124.
(6) [1912] 1 Ch. 284.

contract was approved. There was an acceptance in a formal shape by both parties. Approval of a draft can amount to an acceptance. He also referred to *Brogden* v. *Metropolitan Ry. Co.* (1); *Keighley, Maxsted & Co.* v. *Durant* (2); *Gibbins* v. *North Eastern Metropolitan Asylum District* (3); *Clark* v. *Robinson* (4); *Filby* v. *Hounsell* (5); *Lovesy* v. *Palmer* (6); and *Daniels* v. *Trefusis.* (7)

EVE J. This is a purchaser's action for specific performance and the case has been so elaborately argued that I do not think I ought to keep the parties in suspense, although, for many reasons, I should prefer to have had an opportunity of reducing what I have to say into writing.

The case of the plaintiffs is that by correspondence commencing on August 16, and terminating December 2, 1919, supplemented by what took place at an interview on September 5, a concluded agreement was arrived at whereby they agreed to purchase and the defendant agreed to sell a freehold mansion and premises known as Park Hill, Lyndhurst, at the price of 12,000*l.* The defendant denies that any concluded agreement was ever come to. The Statute of Frauds is not pleaded as a defence to the action. On behalf of the plaintiffs it has been argued that all and several the terms of the contract—that is to say the price, the date for completion of the purchase, the facilities to be afforded to the defendant for removing his furniture from the house, the taking over by them of the fixtures at a valuation, and the length and nature of the title to be deduced—had been settled and agreed between the parties by November 19, on which day their solicitor sent to the vendor a draft of a contract prepared by him embodying those terms.

Accordingly, their first claim is that there was a concluded agreement on the last-mentioned date. I cannot accept that view. Apart from the question whether the purchase

(1) (1877) 2 App. Cas. 666, 672.
(2) [1901] A. C. 240, 247.
(3) (1847) 11 Beav. 1.
(4) (1903) 51 W. R. 443.
(5) [1896] 2 Ch. 737, 741.
(6) [1916] 2 Ch. 233.
(7) [1914] 1 Ch. 788.

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price had then been settled—a question upon which the evidence is conflicting—I think it is quite clear from the evidence of Mr. Fellowes, confirmed as it is by the concluding paragraph of his letter of November 19, in which he says: "As I do not know the title to the property I have, as you will see, provided that the title to be deduced shall be the same as that deduced to the present mortgagees of the property," that the term relating to the title had not theretofore been discussed, and was in fact submitted to the vendor for the first time in the document sent to him with that letter. In these circumstances it cannot, in my opinion, be successfully asserted that an agreement had been concluded on November 19, and it follows that the agreement, if any, must have been arrived at when the defendant returned that draft on December 2. He did so with a covering letter wherein he says: "I am returning the draft; it seems to be all in order." The plaintiffs therefore, as an alternative to their claim that the agreement was concluded on November 19, claim that it was arrived at when the defendant returned the draft unaltered in any respect and accompanied by that letter, and it is a contract in the terms of that draft of which they now claim specific performance.

In order to see whether this claim can be substantiated, it is necessary to revert to the earlier correspondence, commencing with the letter of August 16. In so doing, I respectfully indorse the language with which Lord Cairns opens his speech in *Brogden* v. *Metropolitan Ry. Co.* (1) He says: "My Lords, there are no cases upon which difference of opinion may more readily be entertained, or which are always more embarrassing to dispose of, than cases where the Court has to decide whether or not, having regard to letters and documents which have not assumed the complete and formal shape of executed and solemn agreements, a contract has really been constituted between the parties." The first question which presents itself in construing a correspondence wherein there are repeated references to the preparation of a contract is this: Did the parties contemplate

(1) 2 App. Cas. 666, 672.

and intend by their correspondence to come to a concluded agreement and then reduce the agreement so come to into writing, or did they contemplate and intend thereby to negotiate the terms and conditions of the bargain, but not to enter into any concluded agreement except in the shape of a formal written contract? That is not exactly the language in which the proposition is stated in any of the cases, but I think it is, in substance, the first inquiry I have to answer. In the first letter of August 16, the offer of the purchasers is made in these words: "We are instructed on behalf of clients of ours to make an offer of 12,000*l.* for the property, subject to title and contract." It is conceded that this is a conditional offer, and that a bare acceptance would not have concluded and could not have been intended to conclude a binding contract between the acceptor and the persons who made the offer. It is said, however, that the condition imports this only, that subject to our being able to come to a consensus upon the various matters inseparable from a transaction of this nature, such matters for example as possession, completion, and the like, we agree to buy at the price named, and, therefore, that when the negotiations reached a stage whereat the Court could say "Here is a clear contract embodying all the proper and essential terms," the condition was fulfilled, and the agreement so arrived at became a concluded and binding agreement on both parties. Pursuing this line of argument the plaintiffs contend that the contractual position was reached when all the material terms which had been the subject of negotiation, both oral and writing, were gathered together into a single document, and that document was accepted and approved by the vendor. In substance what they say is that the expression "subject to contract" means what it says, subject to a contract being arrived at, and that such contract may either take the form of a signed document between the parties, or it may be a contract the terms of which have either to be collected from a number of letters, or, as in this case, are already collected in one document approved by both parties.

This sort of question has arisen in many cases and has been

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discussed by many eminent judges. In *Winn* v. *Bull* (1) Sir George Jessel deals with the principle to be applied where he says: "It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail."

Parker J., who sums up the result of the authorities in *Von Hatzfeldt-Wildenburg* v. *Alexander* (2), puts it in this way: "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire." Applying those principles to the present case I do not think it is possible to come to any other conclusion than this, that the reference in the first letter which certainly made the offer therein contained a conditional one, followed as it was by repeated references to the preparation and execution of a contract, imported into these negotiations a condition that a written

(1) 7 Ch. D. 29, 32. (2) [1912] 1 Ch. 284, 288.

contract and in that sense a formal contract was to be entered into. I cannot treat it as a mere expression of a desire to embody an agreement already come to in a more formal document; I think it is a condition. What follows from this? However clearly, in the absence of that condition, the letters would have constituted a binding contract, you cannot, in the presence of that condition, hold them to establish an enforceable agreement without ignoring the condition, and that I think is the point which determines this case. Assuming in the plaintiffs' favour that all the terms of this agreement were discussed and settled one by one in the letters and at the interview, and that all those terms so settled were embodied in the document upon which they rely, unless that document is a contract fulfilling the condition, it is in my opinion impossble to hold that there is a contract enforceable against the defendant.

That brings me to the question of what is the true meaning of the condition. Is it fulfilled as soon as you can assert with confidence that the parties are ad idem and that a consensus on all material points has been reached? I do not think so. I think the condition contemplates and requires a written contract made inter partes and formally entered into. In my opinion, that document has never come into existence in this case, and, in the absence of it, I cannot think I ought to hold that the defendant is bound. On these grounds, therefore, I come to the conclusion that there is no enforceable contract, and that the action must be dismissed with costs.

Solicitors: *Fellowes & Co.; William Sturges & Co.*

G. M.

SARGANT J.

1920

July 14.

HOHLER *v.* ASTON.

[1919. H. 1473.]

Contract—Sale of Land—Purchase for Benefit of a Third Person—Possession taken by Third Person—Part Performance—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

H. and R. were respectively the nephew and niece of Mrs. A. H. was negotiating for a lease of a London house at a long term and a low rent, the transaction involving him to the extent of about 3000*l.* Mrs. A., hearing of this, offered him the amount, telling him that she intended to give the house to R. and her husband. She then verbally agreed with H. to purchase the house for 3000*l.*, which was a price at which he would scarcely have sold outside the family. Shortly afterwards Mrs. A., in the presence of H. and the husband of R., said that she was giving the house to R. and her husband, and H. forthwith entered into a binding contract to take the lease. R. and her husband, with the knowledge of Mrs. A. and H., then gave up their country house and went into possession of the London house, thereby incurring considerable expenditure. The lease had not been granted, or the 3,000*l.* paid, when Mrs. A. died :—

Held, that the contract was not only for a sale from H. to Mrs. A. of the London house (under which she would have been the owner of the house), but was a contract for the purchase of it for the benefit of R. and her husband, and that, although R. and her husband could not themselves enforce the contract, H. was entitled to insist on its being carried out for their benefit, and that the entering into possession of the house by R. and her husband was a part performance of the contract which took the case out of the Statute of Frauds.

Semble, that if R. and her husband had altered their position and incurred expense on the faith of Mrs. A.'s promise to benefit them by the gift of the London house, the principle of *Crosbie* v. *M'Doual* (1806) 13 Ves. 148 would have applied.

The matters in question at the trial of this action arose out of the generosity of Mrs. Louisa Harriet Aston, who was the aunt of Edwin T. Hohler, one of the plaintiffs, and also of Constance, the wife of the Honourable Eric Norman Rollo, who, and her husband, were the other plaintiffs in the action. The defendants in the action were the legal personal representatives of Mrs. Aston. In May, 1918, E. T. Hohler purchased the fag end of a lease on the Westminster Estate of 50, Chester Square. That was held until Lady Day, 1923 or 1924, at a ground rent of 32*l.* He had purchased the lease

with the object of getting an extension from the Duke of Westminster; and first of all he purchased with the intention of residing at 50, Chester Square, himself, but his wife did not care to go there and accordingly he was thinking of surrendering the lease and taking an extended lease, if the terms were good enough and he saw that there was something to be made out of the transaction. About that time Mrs. Aston was anxious that Mr. and Mrs. Rollo should give up the house which they rented at Caversham, Reading, and should come up to London. Having heard of the Chester Square house from E. T. Hohler, Mrs. Aston told him that she would like to rent the house for his sister Mrs. Rollo. E. T. Hohler told Mrs. Aston that he did not care to let the house on lease, and that he thought it would be far better if she bought it—meaning (as the learned judge found) if she bought it for the same purpose as she was thinking of renting it, namely, allowing Mr. and Mrs. Rollo to have the house to live in. Hohler said that the house would cost him practically 3000*l.*, at which price he was prepared to sell. He had at that time already obtained the terms from the agents of the Westminster Estate at which they were prepared to renew, and therefore he added together the purchase price which he had paid for the fag end of the lease, and the probable expenditure on renewal for improvements, costs, and so on, in order to calculate fairly accurately what the total cost of the house to him would be. Soon afterwards Mrs. Aston saw Mr. Gerald Hohler K.C. (who was a brother of E. T. Hohler) and he advised her not to take the lease directly to herself and then assign it, but to have the lease assigned by E. T. Hohler to Mr. and Mrs. Rollo. Some little time prior to October 24, 1918, Mrs. Aston, who had hesitated for a moment till she had ascertained that she had funds available for the purpose of purchasing, saw Hohler, and told him then that she had seen her solicitors, that she had the money, and that she would buy for 3000*l.* Hohler in his evidence said that the 3000*l.* was a quite moderate price for the house, and that he would not have sold it for 3000*l.* to any outsider, and that still less would he have done this, and have bound himself towards

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the owner of the Westminster Estate, and have incurred the liability for improving the house, for the purpose of selling it to an outsider practically at cost price, as that would be undertaking the liability without any adequate prospect of a corresponding return. Then Mrs. Aston suggested a luncheon party, and at her request E. T. Hohler invited Mr. and Mrs. Rollo to come to it. Mrs. Aston, who was trembling with excitement at the prospect of the gift and the pleasure that she was going to derive from making it, told E. T. Hohler exactly what she intended to do, and at the luncheon she made the gift and said : "I am giving the house to Mr. and Mrs. Rollo." E. T. Hohler thereupon did that which he had not done previously ; he went off the same afternoon to the solicitors for the freeholders of 50, Chester Square, and, either directly or through his solicitors, made a bargain with the owner under which Mr. E. T. Hohler was to expend a very considerable sum of money in improving the house, and was to get the substituted long lease of sixty-three years, at a rent of 50*l.* per annum, on his surrendering the existing lease. After that Mr. Rollo communicated the gift, or the intended gift, to his wife, who came up and thanked her aunt. Mrs. Aston wanted her to come to town as soon as possible. Notice was given to determine the existing tenancy of the Caversham house, and shortly after Christmas Mr. and Mrs. Rollo took possession of the Chester Square house, and from that time forward they discharged the ground rent and the outgoings of that house. But difficulties arose in the completion of the transaction as between E. T. Hohler and the owner of 50, Chester Square, for two reasons. First of all, there was an outstanding term of a day ; that is to say, E. T. Hohler was only entitled to a sub-lease, and not to the full original lease from the freeholders. Secondly, there was a difficulty about the preparation of the lease, no doubt partly occasioned through the great difficulties which all solicitors had at that time by the absence of a great portion of their staff. The consequence unfortunately was that before the lease was actually granted—namely, on May 19, 1919—Mrs. Aston died, and the matter was not after her death completed.

E. T. Hohler and Mr and Mrs. Rollo brought the present action against Mrs. Aston's executors, claiming a declaration that they were entitled to have the agreement specifically performed, and payment accordingly of the 3000*l.* The defendants pleaded that there was no written contract, and that the Statute of Frauds was a defence to the action.

A. Grant K.C. (*R. F. MacSwinney*, *J. N. Daynes* and *W. H. C. Rollo* with him) for the plaintiffs. The Statute of Frauds has no application to the case, because Mr. and Mrs. Rollo altered their position and incurred expense on the faith of Mrs. Aston's promise. Her estate is therefore liable to them to perform the contract on the principle of *Crosbie* v. *M'Doual* (1), where it is laid down that there is a distinction between a mere voluntary promise, nudum pactum, which will not support an action, and a promise upon the faith of which another does some act—such as entering into engagements, or paying money—forming a consideration which will support an action, and therefore establish a debt against assets. That case was followed in *Skidmore* v. *Bradford.* (2)

There was here merely an agreement to provide 3000*l.* for the purchase of the house—either one tripartite agreement or two agreements—and the statute does not apply in a case like that. From the plaintiff's point of view, there was one tripartite agreement under which E. T. Hohler was to provide a house, for which Mrs. Aston was to pay 3000*l.*, and which, when provided, was to belong to Mr. and Mrs. Rollo. But even if the statute does apply, the case is taken out of it by Mr. and Mrs. Rollo taking possession of the house. That was part performance sufficient to take the case out of the statute: *Ungley* v. *Ungley* (3); *Surcome* v. *Pinniger.* (4) Their possession required explanation, and that could only be afforded by the verbal contract.

[He also cited *Hammersley* v. *De Biel.* (5)]

(1) 13 Ves. 148.
(2) (1869) L. R. 8 Eq. 134.
(3) (1877) 5 Ch. D. 887.
(4) (1853) 3 D. M. & G. 571.
(5) (1845) 12 Cl. & F. 45.

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Galbraith K.C. and *Wilfrid M. Hunt* for the defendants. The defendants have not produced any evidence because they have not got any. The plaintiffs, in order to succeed, must prove two contracts, one by E. T. Hohler to sell to Mrs. Aston, and one by her to give the house to Mr. and Mrs. Rollo. Neither of these contracts has been proved. The cases have not gone so far as to show that a taking of possession by a person not a party to the contract is enough to take the case out of the statute.

[On the first point they cited *In re Hudson.* (1)]

A. Grant K.C. in reply referred to Fry on Specific Performance, ss. 312–314, 5th ed., pp. 152, 153.

SARGANT J. This is a curious case, and one very near the border line, and I hope that in the conclusion which I am coming to I am not led away by my sympathy with the plaintiffs. On the whole, I have come to the conclusion that the plaintiffs are entitled to the relief which they claim. [His Lordship stated the facts to the effect above set forth down to the statement that Mrs. Aston told E. T. Hohler that she would buy the Chester Square house for 3000*l.*, and continued as follows:] I think that, from that time forward, there was a distinct verbal agreement, enforceable, apart from any defence which could be set up under the Statute of Frauds, that Mr. E. T. Hohler would sell and Mrs. Aston would buy the house, and that part of the terms was that the sale should be for the purpose I will presently mention. [His Lordship stated the rest of the facts to the effect above set forth and continued:] Mrs. Aston's executors and the plaintiffs desire to have the matter dealt with on a strictly legal basis. And in that state of things I have to consider two possible causes of action—a cause of action which belongs to Mr. E. T. Hohler, and a cause of action which belongs to Mr. and Mrs. Rollo.

As regards Mr. E. T. Hohler, I think the position is that he had, at the request of Mrs. Aston, entered into a contract with the owners of the Chester Square

(1) (1885) 54 L. J. (Ch.) 811.

house for the purpose of the new lease being acquired and dealt with—I will say in a moment how—and that there was a contract for good and valuable consideration between him and Mrs. Aston, independently of that—namely, a contract entered into two or three days before October 24, 1918, for the purchase and sale of the Chester Square house. So that, apart from the Statute of Frauds, he had a perfectly good cause of action against Mrs. Aston's estate. Then, as regards the Statute of Frauds, I think that the possession taken by Mr. and Mrs. Rollo was a possession taken obviously and unequivocally in pursuance of the contract. So that the question of the enforceability or unenforceability of the contract in consequence of the Statute of Frauds is completely got over.

Then what was the contract between Mr. E. T. Hohler and Mrs. Aston? If it was merely a contract for purchase and sale, that is not enough for the plaintiffs, because the result would be merely that the house would belong to Mrs. Aston. I do not think that was the true contract. I think that the true contract—the whole contract—was one under which Mr. E. T. Hohler was incurring a liability which he would not otherwise have incurred, and was selling an asset which he would not have acquired or sold at the price in question except on the terms that the sale was made for the benefit of Mr. and Mrs. Rollo. That was the true transaction between him and Mrs. Aston, and, that being so, it seems to me that Mr. E. T. Hohler was entitled, and is now entitled, to enforce for the benefit of the third parties, Mr. and Mrs. Rollo, a contract made with Mrs. Aston for those third parties. The third parties, of course, cannot themselves enforce a contract made for their benefit, but the person with whom the contract is made is entitled to enforce the contract. Shortly before October 24, 1918—and I think this rather helps the plaintiffs—Mrs. Aston had seen Mr. Gerald Hohler K.C., and he had advised her that the proper way of carrying out the transaction was one in which the lease would be transferred directly from Mr. E. T. Hohler to Mr. and Mrs. Rollo. She accepted that advice, and in my judgment there was a complete contract,

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not merely that Mrs. Aston was to be the purchaser and Mr. E. T. Hohler was to be the vendor at the price of 3000*l.*, but also that the purchase should be made for the benefit of Mr. and Mrs. Rollo, and the lease transferred directly to them. On that view of the case the plaintiffs are entitled to succeed.

I will add a few words as to the other aspect of the case—namely, the position of Mr. and Mrs. Rollo. It seems to me that if there had been a direct request by Mrs. Aston to them to determine their tenancy of their Caversham house, and to come up to London and incur expenditure on the faith of a direct promise by her that she would give them the Chester Square house, they would probably, on the cases cited to me by Mr. Grant, be entitled to enforce that contract. But I am very doubtful whether that was the case, and on the whole I think the true view of the position is that the offer to give them the Chester Square house was made on October 24, 1918, prior to any such request, and that what took place afterwards was only the natural consequence of the announcement by the testatrix of her intention to make the gift. If that had been all, it would have been an extremely hard case, because Mr. and Mrs. Rollo did determine their tenancy of the Caversham house and did come up to town, and they did take the Chester Square house and live in a house which they say they could not otherwise have afforded to live in; but, nevertheless, it might have been the inevitable result. I am, however, relieved from having to come to the conclusion to which that part of the case would have led me if there had been no other facts present, and I am glad to be able to find in favour of the plaintiffs on the first ground.

Solicitors for the plaintiffs: *Bullen, Debenham & Co.*
Solicitors for the defendants: *Boulton, Sons & Sandeman.*

F. E.

In re YOUNG.

PUBLIC TRUSTEE *v.* WALKER.

[1920. Y. 89.]

PETERSON J.

1920

May 18, 19; *June* 2.

Will—Settled Legacy—General Power of Appointment given to Nephew predeceasing Testatrix—Hypothetical Survivorship—Will of Nephew containing general Bequest of Personal Estate—Death in Testatrix's Lifetime—Power not exercised—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

Testatrix bequeathed a legacy upon the ordinary trusts for a nephew for life and after his death for his children and failing children (as happened) upon trust for such persons as he should by will or codicil appoint, and she provided that in case the nephew should predecease her the legacy "should be held upon the same trusts and subject to the same powers and provisions so far as capable of taking effect as if" the nephew "had died immediately after me." The nephew died in the lifetime of the testatrix having by his will given unto his wife "all property and effects real and personal which may now or at any time hereafter belong to me":—

Held, that s. 27 of the Wills Act, 1837, only relates to such general powers of appointment as the testator possesses at the time of his death, and that as the nephew never became donee of the power attempted to be given to him by the will of the testatrix on the hypothesis of his surviving her, the general bequest of personal estate contained in his will did not operate to exercise the power.

Jones v. *Southall* (No. 2) (1862) 32 Beav. 31, and *Sharpe* v. *M'Call* [1903] 1 I. R. 179 applied.

ADJOURNED SUMMONS.

By her will the testatrix, who died on July 21, 1919, bequeathed certain specific and pecuniary legacies and gave the residue of her property both real and personal to the Public Trustee upon trust to sell and convert and to set aside for each of certain named nephews and nieces, including Gavin Henry Walker, a sum of 5000*l.* and upon further trust to invest the same and to pay the income to such nephew or niece during his or her life and after his or her death upon the usual trusts for the children or child of such nephew or niece and in default of any child (as happened in the case of G. H. Walker) upon trust for such person or persons or for such purposes as her said nephew or niece

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should by will or codicil appoint, and in default of and subject to any such appointment the testatrix directed that the said sum should fall back into her residuary estate thereinafter disposed of "Provided that in case any of my said nephews and nieces shall predecease me then the sum hereinbefore directed to be held upon trust for such nephew or niece and his or her children and otherwise as aforesaid shall be held upon the same trusts and subject to the same powers and provisions so far as capable of taking effect as if such nephew or niece had died immediately after me."

G. H. Walker was killed in action on March 12, 1915, in the lifetime of the testatrix, leaving a widow but no issue. By his will he appointed an executor and made the following disposition of his property: "I give and bequeath unto my dear wife Dorothy Carlotta Walker all property and effects real or personal which may now or at any time hereafter belong to me except that I leave to my executor 200*l.*" The executor renounced and letters of administration with the will annexed were granted to the defendant widow.

This was a summons for the determination of the question whether the 5000*l.* directed to be set aside and held in trust for G. H. Walker and his children or otherwise as above-mentioned was payable to his widow or had fallen back into the testatrix's residuary estate.

Byrne for the plaintiffs.

Manning K.C. and *Wilfrid Hunt* for the defendant widow, Dorothy Carlotta Walker. The effect of the gift contained in the proviso is analogous in operation to s. 33 of the Wills Act. *In re Clunies-Ross* (1), *In re Greenwood* (2), *In re Smith* (3), in which *In re Gresley's Settlement* (4) was distinguished, conclusively establish the efficacy of a substitutionary gift of this nature. *In re Scott* (5), another case dealing with s. 33, shows how fully effect is given to that

(1) [1912] W. N. 33.
(2) [1912] 1 Ch. 392.
(3) [1916] 1 Ch. 523; [1916] 2 Ch. 368.
(4) [1911] 1 Ch. 358.
(5) [1901] 1 K. B. 228.

section, and a similarly full effect should be given to this proviso.

By force of the proviso G. H. Walker survived the testatrix, and that hypothesis must be worked out for all purposes, and by the effect of s. 27 of the Wills Act the general bequest of personal property in his will exercised the power of appointment. For the purpose of construing both wills the time of the testatrix's death must alone be regarded. There is no greater difficulty in the case of a donee of a power hypothetically surviving the testatrix and exercising the power by his will than in the case of a legatee similarly surviving the testatrix and disposing of the legacy by his will.

R. J. T. Gibson for the defendant residuary legatees (other than an infant defendant) who desired to take no part in the argument.

Sheldon for the infant residuary legatee. This is not a mere gift to the appointees of G. H. Walker. The testatrix has purported to give to a dead man a power of appointment which never comes into operation until after her own death. The power must take effect, if at all, under G. H. Walker's will and he never exercised the power. The assumption is that G. H. Walker died after the testatrix and then his will as on the date of his death is projected to that hypothetical survivorship, and at once you come up against the Wills Act, for his will did not exercise any power because he never had this power at his death. A power cannot be exercised before it is in existence: *Jones* v. *Southall* (No. 2) (1); *Sharpe* v. *M'Call* (2); which latter case cannot be distinguished from this.

By this hypothetical method legatees may be substituted but a power cannot be given to and exercised by a dead man.

Manning K.C. in reply. *Jones* v. *Southall* (No. 2) (1) was not the case of a gift on a hypothetical basis and has no application whatever to the present case. *Sharpe* v. *M'Call* (2) merely followed *Jones* v. *Southall* (No. 2) (1), and was a case

(1) 32 Beav. 31.

(2) [1903] 1 I. R. 179.

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where a husband tried to give the wife a power not allowed by law.

Cur. adv. vult.

June 2. PETERSON J. after stating the facts above set out, continued: The question is whether Mrs. Walker is now entitled to the 5000*l.* in which Gavin Henry Walker would have been interested if he had survived the testatrix. For Mrs. Walker it was contended that she became entitled under the proviso which directed that the sum of 5000*l.* in question was to be held "upon the same trusts and subject to the same powers and provisions so far as capable of taking effect as if such nephew had died immediately after" the testatrix. The argument for Mrs. Walker was that Gavin Henry Walker was under the proviso to be treated for all purposes as having survived the testatrix, and that as his will if he had survived the testatrix would have been an exercise of the general power of appointment under s. 27 of the Wills Act, it must for the purposes of the will of the testatrix be treated as a valid exercise of the power in favour of his wife.

It is established that if a testator gives a legacy to A. and declares that in the event of A. predeceasing him the legacy should not lapse but shall take effect as if he had died immediately after the testator, there is no lapse if A. predeceases the testator, but there is a gift by way of substitution to A.'s legal personal representative to be held by him as part of A.'s estate: *In re Clunies-Ross* (1); *In re Greenwood* (2); *In re Smith* (3); distinguishing or disagreeing with *In re Gresley's Settlement.* (4)

There is no reason why a testator should not in such a case provide that the legacy should go in the same way as it would have gone if the legatee had survived him, for this merely amounts to a substitution of the legatee's legal personal representative for the legatee. The principle of these cases is not in dispute. The question is whether it governs

(1) [1912] W. N. 33.
(2) [1912] 1 Ch. 392.
(3) [1916] 1 Ch. 523.
(4) [1911] 1 Ch. 358.

the present case. If the testatrix had declared that in the event of Gavin Henry Walker predeceasing her the fund should go to his residuary legatees, I see no reason why this should not take effect as a perfectly valid substitutionary legacy. This, however, is not what she has done. The contention is that having regard to the proviso in the testatrix's will that which would not be an exercise of the power of appointment in the original gift became a valid exercise of the power. If Gavin Walker had survived the testatrix his will would by virtue of s. 27 of the Wills Act have been a proper exercise of the general power of appointment. But (omitting the proviso) the will of Gavin Walker who predeceased the testatrix could not have been an exercise of the power in the testatrix's will, for at his death the power was not in existence. Sect. 27 of the Wills Act declares that a bequest of the personal estate of a testator shall be construed to include personal estate over which he may have a general power of appointment. This provision for the construction of the will only relates to such general powers of appointment as the testator possesses at the time of his decease. His will obviously could not exercise a power of appointment which was not in existence at the date of his death; he never became the donee of the power: see *Jones* v. *Southall* (No. 2) (1); *Sharpe* v. *M'Call* (2). In the present case the testatrix seems to have feared that if the legatee predeceased her, his children would not have benefited under the original disposition, and accordingly she provided that, in the events which have happened, the sum of 5000*l.* should be held on the same trusts and subject to the same powers and provisions so far as capable of taking effect as if the legatee had died immediately after her. The clause is not a substitutionary provision but is merely a precautionary provision, that notwithstanding the death of Gavin Walker all the trusts and powers which are capable of taking effect after his death shall do so. Even if the words "so far as capable of taking effect" had been omitted I should have had very great difficulty in coming

(1) 32 Beav. 31. (2) [1903] 1 I. R. 179.

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to the conclusion that the power of appointment was, under the provisions of this clause, to be treated as duly executed by the will of a man who died before the death of the testatrix whose will created the power. But these words in my opinion render the operation of the clause free from any reasonable doubt. The clause contemplates that any powers which are capable of taking effect after Gavin Walker's death shall be exercisable. But the general power of appointment which is a power of selecting the persons to whom the property which is the subject of the power shall go, could not be exercised by Gavin Walker, as he was dead. The power in question was not capable of taking effect after his death. The result is that Mrs. Walker is not entitled to the sum of 5000*l.* which is in question.

Solicitors : *Linklaters & Paines ; Herbert Smith, Goss, King & Gregory.*

R. M.

SARGANT J. 1920 *July* 15, 16.

In re ELLIS'S SETTLEMENT. WASBROUGH *v.* BOYCE.

[1920. E. 378.]

Settlement—Construction—Ultimate Trust—Wife's Next of Kin—Die "Without having been married."

A wife who divorced her husband after having one son remarried, and in contemplation of the second marriage settled 12,000*l.* upon trust after the death of herself and her then intended husband for the issue of the marriage as therein mentioned and in default of issue who attained a vested interest directed that, subject to any exercise of a general power of appointment thereby reserved, the settled fund should be held in the event of her predeceasing her husband "in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto" at the death of the wife "had she died possessed thereof intestate and without having been married." There was no issue of this marriage and the wife predeceased her husband without having exercised the power of appointment. The husband having recently died the question was whether the son of the first marriage was excluded from taking as next of kin. It appeared that upon her first marriage the wife settled 5000*l.* Consolidated 3 per cent. annuities upon trusts under which, in the event which had happened,

the son took absolutely on attaining twenty-one years of age. She also, on the same day as she executed her second marriage settlement, settled 5000*l.* upon the son on his attaining the age of twenty-five years:—

Held, that while the words "without having been married" were more flexible than "without ever having been married," the primary natural meaning of the two expressions was the same, and that in view of the provision already made for the son of the first marriage there was no reason for construing the former expression in other than its natural sense.

Quaere, whether the expression could have been construed as meaning "without having been married to the then intended husband" if the son of the first marriage had been left unprovided for.

The authorities relating to an ultimate trust of this kind examined.

ADJOURNED SUMMONS.

By deed dated October 26, 1891, being a settlement made upon the marriage of Thomas Mullett Ellis and Mary Boyce (hereafter called the husband and the wife respectively), the wife covenanted with trustees to pay to them the sum of 12,000*l.*, and it was agreed that this sum should be invested by the trustees who should from the resulting income during the joint lives of the husband and wife pay to the husband a sum of 300*l.* yearly (subject to a provision for determination in certain events) and to the wife the residue of such income, and after the death of either of them pay the whole of the income to the survivor during his or her life. After the death of the survivor the trustees were directed to hold both the capital and income of the said sum or the investments representing the same upon trust for the issue of the marriage as therein mentioned, and it was declared that, if there should be no child of the marriage who, being a son, should attain the age of twenty-one years, or, being a daughter, should attain that age or marry, the trust premises were to be held in trust for such persons as the wife should while discovert by deed or whether covert or discovert by will appoint, and in default thereof, if she should survive the husband then in trust for herself, but if the husband should survive her then "in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Mary Boyce had she died possessed thereof intestate and without having

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been married such persons if more than one to take as tenants in common in the shares in which they would have been entitled under the same statutes."

The sum of 12,000*l.* was duly paid to the trustees. The wife died intestate on March 13, 1893, and letters of administration to her estate were granted to her husband on June 6, 1893. There was no issue of the marriage. The husband died on August 20, 1919.

The wife had previously been married to Charles Louis Boyce, against whom she obtained a decree absolute of divorce on February 12, 1889. There was issue of this marriage one child only, the defendant Charles E. Sidney Boyce, who was born on September 9, 1887. A settlement of a sum of 5000*l.* Consolidated 3 per cent. annuities, dated October 13, 1886, had been made in contemplation of this first marriage, and under its terms the son became, in the events which happened, entitled on his coming of age to the whole fund. On the same day that the marriage settlement of October 26, 1891, was executed the wife also made a voluntary settlement of a sum of 5000*l.* in favour of the son on his attaining the age of twenty-five years.

On March 31, 1920, the trustees for the time being of the settlement of October 26, 1891, took out this summons raising the question whether on the true construction of this settlement and in the events which had happened the trust funds were held in trust for the defendant C. E. S. Boyce or for the persons or the respective assigns of the persons who under the statutes for the distribution of estates would have been entitled thereto at the decease of the wife had she died possessed thereof intestate and without ever having been married to Charles Louis Boyce or to any other husband, as tenants in common in the shares to which they would have been entitled under the same statutes.

C. W. Turner for the plaintiffs.

Galbraith K.C. and *Dighton Pollock* for the child of the first marriage. The words "without having been married" are more limited in meaning than "without ever having been

married," and in view of the document in which they appear having been made in contemplation of the wife's second marriage, and containing no reference to her first marriage or her child by that marriage, they must be construed as meaning " without having been married to the husband now in contemplation " or, in other words, " without having been married as aforesaid."

In any case such words are intended to exclude the husband only, and it is a general rule that they ought not to be treated as excluding children : *Wilson* v. *Atkinson* (1), *In re Ball's Trust* (2), *Upton* v. *Brown* (3), *In re Arden's Settlement* (4), *Stoddart* v. *Saville* (5), *In re Forbes* (6) and *In re Mare.* (7) In *Clarke* v. *Colls* (8) " unmarried " was treated as equivalent to " without ever having been married," with the result that the children were excluded as well as the husband. There is nothing in the surrounding circumstances here which evidences any intention to exclude the child of the first marriage. The fact that some provision had been made for him before and at the time when the wife was making provision for children of the second marriage in no way shows that she would have wished to exclude him from further benefit on failure of issue by the second marriage.

Harman for brothers and sisters of the wife or their assigns. The child of the first marriage is excluded from the persons taking as her next of kin because the words " without having been married " must be taken to be tantamount to " without ever having been married." That is the natural meaning of the expression, and there is nothing here either in the context or the surrounding circumstances to give it a more limited meaning : see *Emmins* v. *Bradford* (9), *In re Smith's Settlement* (10), and *In re Brydone's Settlement.* (11) Any suggestion in the earlier authorities of a general rule that such words will exclude a husband only but not children

(1) (1864) 4 D, J. & S. 455.
(2) (1879) 11 Ch. D. 270.
(3) (1879) 12 Ch. D. 872.
(4) [1890] W. N. 204.
(5) [1894] 1 Ch. 480.
(6) [1899] W. N. 6.
(7) [1902] 2 Ch. 112.
(8) (1861) 9 H. L. C. 601
(9) (1880) 13 Ch. D. 493.
(10) [1903] 1 Ch. 373.
(11) [1903] 2 Ch. 84.

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must be taken as negatived by these later authorities. Besides, if the object were to exclude a husband, this might be defeated in a case like this where the first husband was divorced, for if the child of the first marriage took and had died under twenty-one years of age the divorced husband would benefit in right of his child. The previous provision here for the child of the first marriage, and especially that made at the time of the marriage, tends to show an intention that this child was not to take under the second marriage settlement.

G. G. Solomon for persons in the same interest adopted the same argument and referred also to *Hardman* v. *Maffett* (1), *In re Watson's Trusts* (2) and *In re Deane's Trusts.* (3)

Roope Reeve for other persons in the same interest.

Galbraith K.C. in reply.

SARGANT J. The summons in this case raises a question of a kind which has been very often debated and with regard to which there is a vast amount of authority. The particular circumstances of this case are not exactly parallel to any case that I have had mentioned to me. [His Lordship read the question as stated in the summons and continued:] The facts are these. The lady in question had been unfortunate in her first marriage and had to obtain a divorce from her husband, and at the time when she contracted the second marriage on which the settlement in question was made she had one child only by her first marriage who was born on September 9, 1887, and was therefore just over five years old. One of the surrounding circumstances, which I think I am entitled to look at, is that this son became entitled under the marriage settlement made on the marriage of his parents to a sum of 5000*l.* Consols on his attaining twenty-one and subject to his mother's life interest. It is also the fact that on the very same day as that on which the second marriage settlement was executed, his mother, Mrs. Ellis, made a voluntary settlement in his favour of a sum of 5000*l.* Under that settlement he became entitled, on attaining twenty-five

(1) [1884] 13 L. R. Ir. 499. (2) (1886) 55 L. T. 316.
(3) [1900] 1 I. R. 332.

years of age, absolutely to that sum of 5000*l.* On the same day that the voluntary settlement was executed the marriage settlement now in question was made. That was a settlement of a sum of 12,000*l.* and it was expressed to be made in consideration of a marriage intended to be solemnized between Thomas Mullett Ellis and Mary Boyce. [His Lordship stated the effect of the settlement, read the ultimate trusts, and continued:] The wife died in March, 1893, within six months of the marriage, intestate, and her husband took out administration. Her husband enjoyed the life interest of the fund during the rest of his life and died in August, 1919.

The question now arises whether under that ultimate trust the person or persons to take are those who would have taken if the lady had never married, and therefore had never had a son by the first marriage, or the person who would have become entitled thereto had the lady merely failed to contract the second marriage on which the settlement was made. It all turns on the meaning of the words "without having been married." Do these words mean without ever having been married, or do they mean without having married the husband she was about to marry at the date when the settlement was executed?

The authorities really begin with *Wilson* v. *Atkinson* (1), which came before Knight Bruce and Turner L.JJ. in 1864. There a widow remarried after having had an illegitimate daughter, and by the settlement made upon her second marriage it was provided that in default of issue of the contemplated marriage the property was to be held "in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Jane Wilson, if she had died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common and in the shares in which they would have taken under the same statutes." Then followed this important addition: "and it is hereby declared that Jane Elizabeth Hogarth Atkinson,"—that is the illegitimate daughter—"the

(1) 4 D. J. & S. 455.

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daughter of the said Jane Wilson, shall for the purposes of this trust be deemed to be the lawful child of the said Jane Wilson." Those added words clearly indicate to my mind that the children of the lady were not to be excluded and, further, that the illegitimate child was to be treated as legitimate. The addition was valueless, unless legitimate children were to take, and therefore the effect of that addition was to prevent the hypothesis which excluded marriage from also excluding one of the results of marriage—namely, the existence of children. The Lords Justices founded their decision in favour of the illegitimate daughter, mainly, or primarily, upon that consideration. But then they each went on to travel a little beyond what it was necessary to decide and expressed a view substantially to the effect that words of the kind in question were only intended to exclude the husband and did not exclude the consequences of marriage so far as related to the existence of children.

That decision was followed by Fry J. in *In re Ball's Trust.* (1) He expressed some doubts but followed that decision. Then in *Upton* v. *Brown* (2), decided six months later, the learned judge came to the same conclusion, and this time without expressing any doubt, although that case was really a more difficult one to decide for this reason. In *In re Ball's Trust* (1), the settlement was made upon the marriage of a spinster; but in *Upton* v. *Brown* (2) the settlement was made on the second marriage of a widow who had had a son by the first marriage, and it contained a provision in express terms for the son of the earlier marriage as well as for any children of that marriage. The ultimate gift over in case the son of the first marriage failed to attain twenty-one and there was no issue of the second marriage and the wife died leaving the husband surviving her was in trust for such persons as she should by will appoint and subject thereto "in trust for such person or persons as under the statute for the distribution of the effects of intestates would have become entitled . . . . had she died possessed thereof intestate, and without having married." There it was held that the

(1) 11 Ch. D. 270. (2) 12 Ch. D. 872.

son of the first marriage, although provided for in terms by the settlement, and not taking under that provision, was entitled to take as next of kin. The view of the learned judge was that a general rule of construction had been laid down in *Wilson* v. *Atkinson* (1) which prevented those words from operating so as to defeat children and gave them a limited operation so as merely to defeat the interests of the surviving husband.

In that state of things the question came before Sir George Jessel in *Emmins* v. *Bradford* (2), where a widow had remarried who had three children by her former marriage. The settlement made upon the remarriage mentioned in terms that she had had three children, so that it was made in full view of that circumstance, and then the trust property was settled in the final gift over, after providing for children of the intended marriage, "in trust for the person or persons who, by virtue of the statute for the distribution of the estates of intestates, would have been entitled thereto in case the said Harriet Johnson had died absolutely possessed thereof without ever having been married." Sir George Jessel declined to treat *Wilson* v. *Atkinson* (1) as laying down any general rule, and came to the conclusion that the words "without ever having been married" were absolutely and completely plain, and necessarily involved dealing with the trust funds as if the lady had contracted marriage neither on the occasion on which the settlement was made nor on any previous occasion. Subsequently a similar case came before Stirling J. in *In re Arden's Settlement.* (3) That had reference to the effect of such words not on the children of a previous marriage, but, as I understand that case, on the children of a subsequent marriage. Stirling J. pointed out that the language in the case before him was: "without having been married," and not as in *Emmins* v. *Bradford* (2), "without ever having been married"; and he preferred to follow the decisions in *Wilson* v. *Atkinson* (1) and *Upton* v. *Brown* (4) and did not exclude the children of the lady by the

(1) 4 D. J. & S. 455.
(2) 13 Ch. D. 493.
(3) [1890] W. N. 204.
(4) 12 Ch. D. 872.

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subsequent marriage. He declined to treat the words "without having been married" as necessarily meaning "without ever having been married."

The question also came before Chitty J. in *Stoddart* v. *Saville* (1); and there the circumstances were rather different. The settlement in question was made upon the marriage of a spinster and there was no provision in the settlement for children. The words to be construed in the ultimate gift over were "without having been married." Chitty J., quite contrary to his usual custom, did not follow the decision of Sir George Jessel, for whom he entertained always the greatest possible respect, and preferred to follow the decision of Stirling J. He pointed out that the words did not in express terms exclude issue and that the legal inference arising from the hypothesis that the wife died without having been married, that she had no children, ought not to be used to exclude the children; and he held that a child of that very marriage, not of a previous marriage or subsequent marriage, took as next of kin. That was pressing *Wilson* v. *Atkinson* (2) to its logical conclusion, and applying it, not as was done in the previous cases, to the question whether a child of a previous or subsequent marriage could take, but to the question whether the child of that very marriage could take, and he held that it could.

I should have mentioned that the case of *In re Arden's Settlement* (3), although reported only in the Weekly Notes, is of greater authority than would be supposed from that, because Chitty J. in giving his decision in *Stoddart* v. *Saville* (1) said he had consulted Stirling J. who had told him that the report in the Weekly Notes was substantially correct.

The next case is *In re Forbes* (4), and I mention it, although objection was taken to it as a case only reported in the Weekly Notes which had not the additional confirmation given to *In re Arden's Settlement.* (3) There Romer J. held that the words as if she had died "a spinster and intestate" did not exclude children of a previous marriage. That case

(1) [1894] 1 Ch. 480.
(2) 4 D. J. & S. 455.
(3) [1890] W. N. 204.
(4) [1899] W. N. 6.

did not go so far as the decision of Chitty J. in *Stoddart* v. *Saville* (1) as it only applied to the child of another marriage than that which was being provided for by the settlement.

The matter then came before Kekewich J. in *In re Mare.* (2) That was the ordinary case of a marriage settlement of a spinster with all the usual trusts for children who attained twenty-one, and with an ultimate gift over in case the wife predeceased the husband to her next of kin as if she had died intestate "without having been married." The wife died in the lifetime of the husband leaving an only son who did not become entitled under the express trusts of the settlement because he never attained twenty-one. Kekewich J., following the general remarks in *Wilson* v. *Atkinson* (3), but not the decision, to their logical conclusion, held that the only effect of these words was to exclude the husband from taking, and that the words did not exclude a child of the very marriage in question from taking as the wife's next of kin.

The matter again came before Swinfen Eady J. in *In re Smith's Settlement.* (4) That case differed somewhat from the case before Kekewich J. because the words in the gift over were "without ever having been married." I am not sure that this made much difference in that particular case because the question was whether a child of that very marriage took. The difference in language might have been much more material if the question had arisen with regard to the children of another marriage. Swinfen Eady J. declined to follow the decision of Kekewich J. and pointed out, among other things, that the result of such a decision might very possibly be to let in the husband after all, because although he was excluded from taking as the person entitled under the statute for the distribution of intestates' estates, he would in the case of a child of that very marriage taking who died under twenty-one, take from that child as his sole next of kin.

In that conflict of authority the matter came on again

(1) [1894] 1 Ch. 480.
(2) [1902] 2 Ch. 112.
(3) 4 D. J. & S. 455.
(4) [1903] 1 Ch. 373.

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before Kekewich J. in *In re Brydone's Settlement* (1) and he merely followed his previous decision. The case then went to the Court of Appeal and that Court (1) adopted the view of Swinfen Eady J. The first part of the headnote is this: "*Wilson* v. *Atkinson* (2) must not be taken to have laid down as a general rule that, in the ultimate trust of the wife's property contained in a marriage settlement for the wife's statutory next of kin as if she had died intestate and 'without having been married,' the words must always be construed so as not to exclude issue of the wife." That again was a question of the children of that very marriage for whom provision had been made in the usual way in the settlement. Romer L.J. said: "It may be conceded that in ordinary marriage settlements there is a presumption that the children of the marriage were to be properly benefited thereunder, and it may well be, and I do not doubt, that in cases in which no provision, or an obviously inadequate provision, is made for the children, it may be said that it would be unreasonable to give to such words as those with which we are dealing their ordinary meaning, and accordingly the Court might in such cases be justified in giving to the words a different meaning. But in the present case there appears to me to be a clear and adequate and proper provision made for the children."

In the case before me Mr. Galbraith did not attempt to say that the words "without having been married" would not have been sufficient to exclude children of that very marriage itself; but he pointed out that the whole of the language of this settlement was independent of, and made no mention of, the wife having been previously married and having a child, and was entirely directed to the marriage which was then in contemplation by the parties, and he contended accordingly that in the ultimate trust the words "without having been married" might easily be construed as meaning "without having been married to the husband now in contemplation," or "without having been married as aforesaid." There can be no question that the words

(1) [1903] 2 Ch. 84, 94. (2) 4 D. J. & S. 455.

"without having been married" are much more flexible than such a phrase as "without ever having been married." There is this further to be noted, which also tends in favour of the flexibility of the words, that in *Clarke* v *Colls* (1) it was recognized that the supposition that the wife died "unmarried" was satisfied by the wife dying a widow, although the natural meaning of "unmarried" would be without ever having been married. Still, I must, I think, come to the conclusion that, apart from some very distinct reason for holding the contrary, the words "without having been married" mean "without ever having been married." They are more flexible words, but, apart from some distinct reason to be found either in the language of the settlement or in the surrounding circumstances, which, I think, I am entitled to look at, I can only construe those words in accordance with their ordinary natural meaning—namely, "without ever having been married."

What would be the proper construction if the wife had not had provision made for her son of the first marriage by the first marriage settlement, or, what is still more important to my mind, if she had not made a contemporaneous voluntary settlement expressly providing for that son, I do not know. I should wish to reserve my opinion as to what would be the effect in a plain, simple case where a widow with a family for whom she had made no provision remarried, and her marriage settlement provided for the children of that marriage and then contained an ultimate trust for the persons who would have been her next of kin if she had died intestate and without having been married. It is quite possible that in such a case one would feel bound to come to the conclusion that there was enough in the circumstances of the case to cause one to read the words "without having been married" in the rather less natural meaning. I do not wish to express an opinion as to that one way or the other; in this case I am clear that the circumstances are different. The wife's son by the first marriage was provided for to the extent of some 5000*l.* originally, and then, by a settlement executed

(1) 9 H. L. C. 601.

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contemporaneously with the marriage settlement, she made special provision for that son if only he attained the years of discretion. That being so, I cannot find sufficient in the circumstances of this case to cause me to read the words in this marriage settlement "without having been married" in a less extensive sense than their natural meaning—namely, "without having been married at all."

I think there is this also to be taken into consideration. Swinfen Eady J. pointed out in *In re Smith's Settlement* (1) that the effect of reading the words so as not to exclude an infant child might well be to bring about the very thing it was obviously intended to prevent—namely, the first husband taking. In the present case I cannot help realizing that if the words I am construing did not exclude the infant son of the first marriage, the result might well have been that, if the infant had died while still an infant, the settled property would have gone to the first husband from whom the lady had obtained a divorce. I think that consideration is possibly of some value; but the main grounds on which I decide this case is that the words "without having been married" in their natural meaning mean "without ever having been married," and that I cannot find enough, on a consideration of the circumstances of the case, to cause me to put a different construction upon them.

Solicitors: *Stanley & Co., for Stanley, Wasbrough, Doggett & Baker, Bristol; Vizard, Oldham, Crowder & Cash; Sharpe, Pritchard & Co., for William Walker, Manchester; Murr, Rusby & Archer, for Sharpe, Darby & Millichip, West Bromwich; Field, Roscoe & Co., for Bubb & Co., Cheltenham.*

(1) [1903] 1 Ch. 373.

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SARGANT J.
1920
July 23.

[1920. W. 1227.]

Settlement—Settled Land—Power to Tenant for Life to apply Money arising by exercise of special Powers in permanent Improvements—"Additional or larger powers"—Separate independent Power—Sanction of Trustees—Capital Moneys—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 26, 56, 57.

Under a deed of settlement the tenant for life was granted "in addition to and in aid" of his statutory powers special powers of sale, enfranchisement, exchange, and partition and power also "to apply any money to arise by or upon such sale enfranchisement exchange or partition .... in or towards the permanent improvement as to him .... shall seem advantageous" of the settled estates. There was also a provision in the settlement that capital moneys arising under the Settled Land Acts might be applied upon improvements authorized by those Acts without any scheme being first approved by the trustees and without an order of the Court:—

Held, that the power to apply any money to arise under the special powers in permanent improvements as to the tenant for life seemed advantageous was not an "additional or larger" power within s. 57 of the Settled Land Act, 1882, and was not therefore exercisable "in the like manner" as if conferred by the Act. It was a separate independent power differing entirely from the provisions as to improvements in the Act and not a mere extension of them. The trustees were accordingly bound to apply money arising under the special powers on such permanent improvements as to the tenant for life seemed advantageous without having a scheme submitted to them and without an order of the Court.

Capital moneys arising under the Act of 1882 were by virtue of s. 21, sub-s. xi., of the Act also applicable under the above power upon permanent improvements without the need for a scheme or an order of the Court.

ADJOURNED SUMMONS.

By a deed of settlement dated February 15, 1901, made upon the marriage of Hugh Richard Arthur Duke of Westminster, the family estates known as the Grosvenor Estates, which included the London estates, were limited in the events which had happened to the use of the Duke for life with remainder to Lord Arthur Hugh Grosvenor for life and with divers remainders over.

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Gerald Hugh Grosvenor, who was born on February 13, 1907, was the first tenant in tail in remainder. By the settlement it was declared "that in addition to and in aid of the statutory powers of leasing and of sale enfranchisement exchange partition and other dispositions and of investment or other application of capital money in or for improvements and of mortgage and charge and of contract for any of the above purposes the said Hugh Richard Arthur Duke of Westminster during his life and every other person hereby made tenant for life of the said premises hereby assured when he or she shall be entitled to the possession or the receipt of the rents and profits of the same premises . . . . shall have the following powers." Then came a large number of powers, amongst which were: powers of sale, enfranchisement, exchange and partition, it being provided that the trustees should receive all moneys which might become payable upon any such sale enfranchisement exchange or partition upon trust to invest the same as capital money arising under the Settled Land Acts in the purchase of other lands and hereditaments; power to raise any sum or sums of money which might be required for the purpose of laying out and appropriating any part or parts of the settled lands for various specified purposes or "for any permanent improvement whether by drainage or by the erection rebuilding or repair of buildings or otherwise" of any of the hereditaments for the time being subject to the uses or trusts of the settlement; and also power "to apply any money to arise by or upon such sale enfranchisement exchange or partition as aforesaid in or towards the permanent improvement as to him or them shall seem advantageous of any of the hereditaments for the time being subject to the then subsisting uses or trusts of these presents . . . . and also in or towards any of the purposes for which moneys are hereinbefore authorised to be raised by mortgage of the said hereditaments." Near the end of the settlement there was a declaration "that capital money arising under the Settled Land Acts, 1882 to 1890, may be applied by the direction of a tenant for life of the premises hereby settled in or towards payment for an improvement authorised by those

Acts without any scheme being first approved by the trustees and without an order of the Court and upon such certificate as by the Act of 1882 is required that the work or operation has been properly executed."

Improvements of a permanent nature had recently been carried out at 10, Upper Grosvenor Street, 1 and 2, Worrade Court, Ebury Street, and 58, Park Street. Several houses in Wilton Crescent had also been refronted and the refronting of others was in progress. These works had been done under the advice of the architect and surveyor of the Duke's London estates and with a view to reletting. In no case had a scheme been submitted to the trustees of the settlement for their approval before the execution of the work.

This summons was taken out by the Duke for the determination of the question whether the trustees of the settlement were bound upon his direction to apply any money to arise by any sale enfranchisement exchange or partition and also capital moneys arising under the Settled Land Acts in or towards any permanent improvement as to him should seem advantageous of any of the hereditaments subject to the subsisting uses or trusts of the settlement, although such improvement was not an improvement authorized by those Acts and without any scheme being first approved by the trustees and without any order of the Court.

It was not contended that all the improvements that had been effected were improvements sanctioned by the Settled Land Acts.

Maugham K.C. and *Baden Fuller* for the Duke. Although the settlement expressly provides that any improvement authorized by the Settled Land Acts may be effected out of capital moneys upon the direction of the tenant for life without any scheme being first approved by the trustees, it is said that a scheme must be submitted before any exercise of the special power to effect permanent improvements contained in the settlement. This argument is based on s. 57 of the Settled Land Act, 1882, which provides in sub-s. 2 that "any additional or larger powers" conferred on a tenant for life

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shall "operate and be exercisable in the like manner . . . . as if they were conferred by this Act, unless a contrary intention is expressed in the settlement." It is said that this renders s. 26 applicable and that a scheme of the permanent improvements must therefore be submitted to the trustees, although the power itself does not suggest this.

The special power to make permanent improvements is not however an "additional or larger" power within the meaning of s. 57, sub-s. 2. It is not an extension or enlargement of any statutory power. Under the Act a tenant for life is not given power to expend capital moneys on improvements. All he can do is to submit a scheme to the trustees or the Court, and it is the trustees or the Court who decide whether capital moneys shall be expended on the proposed improvements. The settlement here gives a power to the tenant for life to apply capital moneys in improvements. There is no corresponding power in the Act and therefore the power specially conferred cannot operate and be exercisable "in the like manner, and with all the like incidents, effects, and consequences" as if conferred by the Act. It is really sought to use s. 57 so as to abridge the power conferred by the settlement and this is directly contrary to s. 56. Even if the power were an additional power within s. 57, there is a sufficient expression of a contrary intention within sub-s. 2 of s. 57, because the power provides that the tenant for life shall make improvements as to him shall seem advantageous.

Cleveland-Stevens for the tenant for life in remainder adopted the arguments on behalf of the Duke.

A. Grant K.C. and *Harman* for the tenant in tail in remainder. Sect. 57 is clearly applicable. The settlement itself says that the special powers are "in addition to and in aid of the statutory powers." The words in s. 57 "additional or larger powers" are very wide, and apply not merely to extensions of statutory powers but to any and every additional power. The effect of s. 57 is to include the permanent improvements authorized by the special power amongst the improvements authorized by the Act, so that the special power operates and is exercisable "in like manner" as if conferred by the

Act. Sect. 56 has no application here. It only provides that powers conferred by the Act are to be in addition to and not in substitution for powers conferred by the settlement.

Bryan Farrer for the trustees of the settlement. The question here relates not only to the application of capital moneys arising under the exercise of the special powers but also to the application of capital moneys arising under the Act. The trustees desire to obtain the decision of the Court whether the provision in the settlement that capital moneys may be applied in manner authorized by the Act without the necessity of a scheme does not impliedly exclude their application under the special power as to permanent improvements without a scheme.

Maugham K.C. in reply. Capital moneys arising under the Act are by s. 21, sub-s. xi., applicable in any mode that moneys arising under the special power of sale in the settlement may be applied and, as already submitted, money arising under that special power may be applied in permanent improvements without the need to submit a scheme.

SARGANT J., after stating the facts. It is admitted that so far as regards improvements authorized by the Settled Land Acts no scheme has to be approved by the trustees but it is suggested that, on the principle of the expression of one eventuality excluding another, the necessity of a scheme being approved by the trustees is not waived but remains necessary in the case of an improvement not authorized by the Acts but made in pursuance of the special powers given by the settlement. It is said that in that case it is still necessary that a scheme should be approved by the trustees and that the tenant for life cannot act simply on his own discretion. That contention rests to some extent on s. 57 of the Settled Land Act, 1882. Sub-s. 1 of the section is in these terms : " Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act " ; and then sub-s. 2 provides : " Any additional or larger powers so conferred shall, as far

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as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement." It is suggested that prima facie a scheme is necessary, because it is required under the Act in the case of an improvement authorized by the Act and the larger powers given by the settlement take effect merely as if they were extensions of the similar powers given by the Act. It seems to me however that the power given in this particular settlement of applying "any money to arise by or upon such sale enfranchisement exchange or partition as aforesaid in or towards the permanent improvement as to him . . . . shall seem advantageous of any of the hereditaments," is not on its true construction a mere extension of the power in that respect given by the Act, but is a separate and independent power. Under the Act the tenant for life is in a different position from that in which he is placed by this particular power. Under s. 26 of the Act a tenant for life has no power to make improvements out of capital moneys. When he is desirous of having capital moneys expended on improvements he may submit a scheme to the trustees who have power to sanction or refuse it, so that under that provision he is not in an independent and unfettered position. Here under the express words of the power in the settlement the tenant for life is placed in the position of dominus; it is for him to judge of the advisability or advantage of an improvement and he is entitled to apply the moneys arising upon a sale, enfranchisement, exchange or partition effected under the special powers conferred by the settlement in payment of any permanent improvement that he thinks advantageous to the settled property.

The clause I am considering may be contrasted with a clause providing that the improvements authorized by the Settled Land Act are in the case of the particular settlement to be extended so as to include a large number of other improvements. The latter proviso would operate as an

enlargement of the kind of improvements falling within the power but the method of making the improvement laid down by the Act, under which the initiative has to be taken by the tenant for life and the sanction of the trustees obtained, would be left undisturbed. I think here that the position is entirely different and that I should be wrong to construe the special power in the settlement as a mere extension of the power to make improvements conferred by the Settled Land Act, 1882, to be exercised with the incidents effects and consequences of a power under the Settled Land Act as provided by s. 57.

I am therefore of opinion that any necessity for a scheme is done away with as regards "money to arise" from a sale enfranchisement exchange or partition under the special powers in the settlement. If moneys that had so arisen were the only funds in question, the point would seem to be reasonably clear. Is the position the same with regard to moneys that have not arisen under these powers but are ordinary capital moneys under the Settled Land Acts? During the first part of the arguments I did not appreciate that there were any capital moneys in question. I must say that I have felt some difficulty in regard to them, but in the result Mr. Maugham has been able to satisfy me on this point also by pointing out the provisions of s. 21, sub-s. xi., of the Settled Land Act, 1882. Under s. 21 capital moneys arising under the Act may be applied in various ways, and the last way specified which is in sub-s. xi., is "in any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder." There is only one express power of sale in the settlement and that is one of the powers given to a tenant for life which precede the power conferred by him "to apply any money to arise by or upon such sale enfranchisement exchange or partition as aforesaid in or towards the permanent improvement as to him . . . . shall seem advantageous" of the settled property. Therefore the capital moneys here are by this sub-section of the Act put in exactly the same position as moneys directed to be applied under that power; and I

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have already said that those moneys can be applied towards any permanent improvement that may seem advantageous to the tenant for life without the necessity of obtaining the approval of a scheme.

In my judgment therefore the whole of the question asked by the summons must be answered in the affirmative.

Solicitors: *Boodle, Hatfield & Co.; Withers, Bensons, Currie, Williams & Co.; Nicholl, Manisty & Co.*

H. C. G.

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1920
July 8, 9.

RECKITT *v.* CODY.

[1919. R. 1217.]

Vendor and Purchaser—Freehold Estate—Restrictive Covenants—House—User as "Private dwelling house"—Covenant to indemnify—Construction.

By a deed of February 23, 1911, a parcel of freehold land forming part of a larger estate was conveyed to the plaintiff as purchaser and he covenanted with his vendor to observe and perform the stipulations in relation to the assured hereditaments contained in a schedule to the deed. Two of such stipulations were that no house to be erected on the land conveyed should be used for any purpose other than that of a private dwelling house, and that no detached dwelling house which should be built should be of less value than 800*l.* By a deed of July 17, 1919, the plaintiff conveyed to the defendant in fee a parcel of land being part of that conveyed by the deed of 1911, and subject to the restrictive covenants and stipulations contained in that deed so far as the same were subsisting and capable of taking effect, and the defendant, for herself, her heirs and assigns (with intent to bind the hereditaments thereby conveyed and all persons in whom the same should for the time being be vested, but not so as to be personally liable under the covenant after she had parted with the same) did covenant with the plaintiff, his heirs and assigns, that she would thenceforth observe and perform the said restrictive covenants and stipulations so far as aforesaid. The defendant erected on the land conveyed to her a detached building or shed of a less value that 800*l.*, to be used as a classroom for boys. In an action by the plaintiff for a mandatory injunction to restrain the continuance of this building in breach of the restrictive covenants:—

Held, following *In re Poole and Clarke's Contract* [1904] 2 Ch. 173, and *Harris* v. *Boots Cash Chemists* (*Southern*) [1904] 2 Ch. 376, that the covenant in the deed of July 17, 1919, by the defendant was a

covenant to indemnify and nothing more, and that, in the absence of any proceedings taken or threatened against the plaintiff on the part of the original vendor to enforce the restrictive covenants in the deed of 1911, the plaintiff had no cause of action against the defendant. The rule of construction as to covenants of this character in reference to assignments of leaseholds applies also to similar covenants on a conveyance of freeholds.

Held, further, on the facts, that the building complained of was an erection in the nature of a house capable of being inhabited, and was erected and used in breach of the original restrictive conditions.

WITNESS ACTION.

The plaintiff, Frank Norman Reckitt, was the owner in fee simple of certain hereditaments part of the Ashley Wood estate at Walton-on-Thames, in the county of Surrey. By an indenture dated February 23,1911, as stated in paragraphs 2 and 3 of the statement of claim, there was conveyed to the plaintiff in fee simple by the vendor, E. H. Thompson, and certain other parties, a parcel of land forming part of the Ashley Wood estate, having a frontage of 100 feet in the Crossway Road, delineated on a plan drawn thereon.

By this deed the plaintiff covenanted, for himself and his assigns, with E. H. Thompson, his heirs and assigns, that the plaintiff, his heirs and assigns, would thereafter at all times observe and perform the stipulations and regulations in relation to the hereditaments thereby assured, contained in the second schedule thereto, namely (inter alia) (1.) Value of buildings. "No house to be erected on the land shall be used for, or converted to, any other purpose than that of a private dwelling house. No house shall be erected except detached or semi-detached dwelling houses with stabling, lodges, detached outhouses . . . . or other appurtenances. No detached dwelling house with the appurtenances which shall be so built shall be of less value than 800*l*."

(2.) Trades prohibited. "No building shall be erected for or used as a tavern, licensed beer-house, or as a factory. No hut, caravan, shed, house on wheels, or other chattel adapted or intended to be used as a dwelling house, or sleeping apartment . . . . shall be erected, made, placed on, used, or be allowed to remain upon, the land"; and the vendor might enter and remove the same.

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By an indenture dated July 17, 1919, made between the plaintiff and the defendant, Marguerite Sophia Cody (spinster), after reciting that the plaintiff was seised for an estate of inheritance in fee simple in possession, subject to the restrictive covenants and stipulations therein referred to, but otherwise free from incumbrances, of the hereditaments thereinafter described and intended to be conveyed, the plaintiff, as beneficial owner, conveyed to the defendant and her heirs a parcel of land therein described as lying to the north-west of the Crossway Road, with a frontage of 60 feet (being part of the land comprised in the indenture of 1911), to the use of the defendant in fee simple, subject to the restrictive covenants and stipulations contained in the indenture of 1911, so far as the same were subsisting and capable of taking effect as regarded the hereditaments conveyed to the defendant by the indenture of 1919; and by the same indenture the defendant, for herself, her heirs and assigns (with intent to bind the hereditaments thereby conveyed and all persons in whom the same should for the time being be vested, but not so as to be personally liable under the covenant after she had parted with the same), did covenant with the plaintiff, his heirs and assigns, that she, her heirs and assigns, would thenceforth observe and perform the said restrictive covenants and stipulations so far as aforesaid. The plaintiff alleged in his statement of claim that in breach of the restrictive covenants and stipulations the defendant in October, 1919, caused to be erected on the land so conveyed to her by the indenture of 1919 a detached building of less value than 800*l.* and adapted to be used as a dwelling house, and the defendant intended to use, or authorize her father, Sidney Cody, to use and convert the said building for the purpose of a schoolroom in connection with a boys' school proposed to be carried on thereon. The plaintiff also alleged that the building in question was of a most unsightly design and detrimental to the amenities of the Ashley Wood estate, which was of a purely residential character.

By an interlocutory order made by Peterson J. on

November 14, 1919, it was ordered that the defendant be restrained until judgment on the action from using the building otherwise than as a private dwelling house.

The plaintiff now claimed an injunction to restrain the defendant from using the said building, or any other house or building erected on the land comprised in the indenture of 1919, otherwise than for the purpose of a private dwelling house, and for an order directing the defendant to take down and remove the building, and further relief.

By her defence the defendant alleged that the building in question was a portable corrugated iron sectional shed erected for the purpose of being used by her father as a classroom for boys, and that it was not a "building," and was not adapted or intended to be used as a dwelling house. She further pleaded that the land comprised in the indenture of 1911 formed part of a larger piece of land known as the Walton Lodge Farm estate, which was comprised in a conveyance on sale dated November 21, 1895, made between two vendors therein stated, of the one part, and E. H. Thompson (the plaintiff's vendor) of the other part, and in that conveyance E. H. Thompson covenanted to observe and perform the restrictions and conditions in relation to the Walton Lodge Farm estate which were contained in the first schedule thereto; such restrictions and conditions were in the same form as those contained in the second schedule to the indenture of 1911.

The defendant alleged that at the date of the indenture of 1919 the restrictive covenant contained in the indenture of 1911 prohibiting the user or conversion of any house for any other purpose than that of a private dwelling house, was not subsisting or capable of taking effect, as regarded the land conveyed to her by the indenture of 1919. It was also alleged that the Walton Lodge Farm estate was not a purely residential estate, and particulars of user of buildings other than as private dwelling houses were stated. Alternatively, that if the covenant was still subsisting it had not been enforced and it would be now inequitable to enforce it.

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Gover K.C. and *H. E. Wright* for the plaintiff. The question is (1.) whether this erection is a house within the meaning of the covenant, and (2.) whether its user as a classroom for boys is using it otherwise than as a private dwelling house. On the first point it is clearly a house, a permanent structure, capable of being lived in: *Grant* v. *Langston* (1); *Lewin* v. *End* (2); *B. Aerodrome* v. *Dell* (3), where the question arose as to what were "houses" for the purposes of rating. On the second point as to user, to use a building for the purposes of a school is not user as a private dwelling house: *Hobson* v. *Tulloch* (4); *German* v. *Chapman*. (5) As for the alleged acquiescence, it is for the defendant to establish that.

Courthope Wilson K.C. and *J. G. Trapnell* for the defendant. The vendor cannot sue on the covenant in the deed of July 17, 1919, by the defendant to observe and perform the restrictive covenants and stipulations so far as aforesaid. That is in effect a mere covenant of indemnity, although not expressly so stated: *In re Poole and Clarke's Contract* (6); *Harris* v. *Boots Cash Chemists* (*Southern*). (7) As the person who could enforce the restrictive covenants in the deed of February 23, 1911, has taken no steps to do so, there was no right of action in the plaintiff at the time when he issued his writ. That gets rid of any question of fact as to the nature of this building and of its user, and the action fails. The covenant is affirmative and not negative in its terms and cannot be enforced by injunction. The remedy would be in damages.

Gover K.C. in reply. This covenant to observe and perform the covenants in the lease is intended by the vendor to protect his other property and to bind the successors of the purchaser. *In re Poole and Clarke's Contract* (6) was a case of the sale of freeholds subject to restrictive covenants, and the covenant by Poole to observe and perform these covenants was expressed to indemnify the vendor. It was also recognized in that

(1) [1900] A. C. 383.
(2) [1906] A. C. 299.
(3) [1917] 2 K. B. 380.
(4) [1898] 1 Ch. 424.
(5) (1877) 7 Ch. D. 271.
(6) [1904] 2 Ch. 173.
(7) [1904] 2 Ch. 376.

case that in an assignment of leaseholds a covenant similar to that in the present case would be held to be a covenant of indemnity. *Harris* v. *Boots Cash Chemists* (*Southern*) (1) was a case of leaseholds. But here it is a case of freeholds, and the terms of the covenant are different; there are no express words of indemnity at all. The parenthetical sentence in the covenant "with intent to bind the hereditaments" is practically meaningless if this covenant is only a personal covenant to indemnify. The covenant is also negative in effect and character if not in terms, and the plaintiff is entitled to relief by way of injunction. *Piggott* v. *Stratton* (2) was a case of an affirmative covenant. On the question of fact this erection may also come under the second condition in the schedule as a "chattel." *Patman* v. *Harland* (3) is an analogous case.

EVE J. In the month of February, 1911, the plaintiff purchased a plot of freehold land situate on a property known as the Ashley Wood estate, at Walton-on-Thames, on which estate he already owned a large number of other plots. The conveyance to him, dated February 23, 1911, imposed the restrictions on the use of the land set out in para. 3 of the statement of claim. Before the commencement of this action he had sold the whole of the land so conveyed to him, part of it having been purchased by the defendant and conveyed to her on July 17, 1919. In that conveyance are contained two covenants on the part of the purchaser, the one that she, her heirs and assigns, "will not erect any building of any kind within 30 feet of Crossway," the street on which the land abuts, "without the consent of the vendor first obtained in writing," and the other in these words: "And the purchaser doth hereby for herself, her heirs and assigns (with intent to bind the hereditaments hereby conveyed and all persons in whom the same shall for the time being be vested, but not so as to be personally liable under the covenant after she has parted with the same), covenant

(1) [1904] 2 Ch. 376. (2) (1859) 1 D. F. & J. 33, 45.
(3) (1881) 17 Ch. D. 353 359.

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with the vendor, his heirs and assigns, that she the purchaser, her heirs and assigns, will henceforth observe and perform the said restrictive covenants and stipulations so far as aforesaid." "The said restrictive covenants and stipulations so far as aforesaid" are the restrictive covenants contained in the conveyance of February 23, 1911. The purchaser has erected on a portion of the land acquired by her a building or hut which the vendor alleges to be a breach of one or more of the restrictive covenants by which he is bound, and accordingly he has commenced this action for a mandatory injunction requiring the purchaser to remove the building. The purchaser denies that the erection is a breach of any of the covenants, and has raised a point of construction which may make it unnecessary to determine that question of fact. Her point is that, in the circumstances, the vendor cannot sue on the covenant in her conveyance because it is a covenant of indemnity only, and inasmuch as the person entitled to enforce the restrictive covenants in the conveyance of February 23, 1911, has neither taken nor threatened any proceedings against the plaintiff, the latter has no cause of action against the defendant. That raises a somewhat important question. The conveyance, to which alone I can look for the purpose of construing it (although I am bound to pay regard to the circumstances subsisting at the time it was executed), recites that the vendor "is seised for an estate of inheritance in fee simple in possession subject to the restrictive covenants and stipulations hereinafter referred to," and that he "has agreed with the purchaser for the absolute sale to her of the said hereditaments at the price of 225*l.*," and then the habendum is in these words: "To hold the same unto and to the use of the purchaser in fee simple subject to the restrictive covenants and stipulations contained in an indenture of the 23rd February, 1911," and the deed concludes with the covenants to which I have already fully referred. What is the construction of a covenant of that description—not a direct covenant with the vendor to do, or abstain from doing, specified acts, but in terms a covenant to observe and perform the restrictive covenants

and stipulations by which the vendor is himself bound? Is it merely a covenant of indemnity, or is it a covenant which the vendor can enforce, independently of the question whether he is himself being sued by his covenantees? In support of the argument that it is merely a covenant of indemnity two cases are relied on. One is *In re Poole and Clarke's Contract* (1), and the other *Harris* v. *Boots Cash Chemists* (*Southern*) (2) It is true that in the former of those cases the question which the Court had to determine was the nature of the covenant on which the vendor, under the particular contract there entered into, could insist, and that the decision was that under the particular contract the vendor could only insist upon what was in fact a covenant of indemnity, and to remove any possible doubt as to the nature of the covenant, the Court thought fit to preface it with certain introductory words. But the Court having so done in that particular case, went on to point out that the introduction of the prefatory words was not intended to throw any doubt on the true construction of the covenant if they were absent. Vaughan Williams L.J., after the form of the covenant and prefatory words had been agreed, said: "I wish to add that the practice of conveyancers with regard to the covenant to be entered into by an assignee of leaseholds must stand unaltered." Why he said that is obvious. Lord Justice Romer, in the course of the arguments, had pointed out that the practice as regards assignments of leaseholds had been so long settled that it ought not to be interfered with. The Lord Justice goes on: "and there is nothing in our judgment which will render it necessary to introduce into the covenant any other words. But, in my opinion, even in that case"—that is, even in the case where the covenant stands without any prefatory words—"the covenant ought to receive the same construction as if it had been prefaced with the words which we have suggested in the present case"; and in those observations Romer and Cozens-Hardy L.JJ. concurred. The effect of that was that the Court recognized that the covenant in an assignment

(1) [1904] 2 Ch. 173, 177. (2) [1904] 2 Ch. 376.

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of a lease in the ordinary and usual form is merely a covenant to indemnify, and although this view was sought to be challenged in the case of *Harris* v. *Boots* (1), Warrington J., as he then was, came to the conclusion that the matter had been concluded by the Court of Appeal in the earlier case. The question in this case is whether, in a conveyance of freeholds, a similar, but not identical, covenant ought to receive the same construction. I think that, prima facie, it ought, but it is said that it ought not to in this case, on two grounds: the first being that the vendor, as the owner of a large amount of more or less contiguous residential property, must have intended, by the imposition of this covenant on the purchaser, not only to indemnify himself against any claim by a person entitled to enforce his covenant, but also to preserve his adjoining property from possible deterioration or damage. It may be that the vendor thought this covenant would bring about this result, but in the absence of any reference to the other property of the vendor, or of any evidence that the purchaser had knowledge of the fact that he owned any other property in the immediate vicinity of the land conveyed to her, I do not think the possible, or even probable, desire of the vendor to protect his other land justifies me in imposing on this covenant a wider construction than it would otherwise bear.

Then it is said that the introduction of the parenthetical sentence "with intent to bind the hereditaments hereby conveyed and all persons in whom the same shall for the time being be vested, but not so as to be personally liable under the covenant after she has parted with the same," is somewhat meaningless if in fact it is merely a personal covenant to indemnify. I agree, and think it is difficult to know what the parties really intended, but I am not prepared to hold that the introduction of that parenthesis is sufficient to alter the whole construction of the covenant. In my opinion I am bound by authority to hold that in the absence of special circumstances, such a covenant as this is a covenant to indemnify, and nothing more, and

(1) [1904] 2 Ch. 376.

accordingly, in the absence of any complaint on the part of the original vendors, I come to the conclusion that the plaintiff here has no cause of action.

There are two other matters to which I must refer. I am not prepared, as at present advised, to hold this to be an affirmative covenant for the breach of which the remedy would be in damages and not by way of injunction. A covenant to perform and observe all the covenants and stipulations contained in a document introduced by reference, seems to me to be equivalent to a covenant to perform all the affirmative and observe all the negative stipulations to which reference is made. In one sense it may be that such a covenant is affirmative, but only in form; in substance it is partly affirmative and partly negative, and I think it would be disregarding the substance of the matter, if a case for relief were made out, to hold that the covenant was not sufficiently negative in character to entitle the person aggrieved to relief by way of injunction.

Then, on the disputed question of fact, the evidence has established that this superstructure is not affixed to the freehold. On the one side, I have heard the evidence of competent surveyors who say that in the ordinary course the sill on which the superstructure rests would have been affixed to the dwarf walls by mortar or cement, and that evidence accords with the experience of most persons who have had anything to do with the erection of structures of this nature, but the defendant's father, who superintended the whole of the work and saw the sill laid, states positively that it was not so affixed but simply rests on the top of the dwarf walls, and as I believe what he says I must accept his statement in preference to the evidence of these competent gentlemen who candidly admitted that they had not had the opportunity of examining the sill and its attachment, if any, to the walls. But even so, I should have been prepared to hold this structure a breach of that part of the second condition which prohibits the erection of a house for any other purpose than that of a dwelling house. It is, in my opinion, a house, and not the less so because it is a small one consisting of two rooms

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only, or because the district council have sanctioned its erection upon the terms that they can order its removal at any time on three months' notice, or because it is constructed of timber and corrugated iron. It is a building erected on a foundation of 18 inches or 2 feet of brickwork covered with corrugated iron on the outside, felted and match-boarded on the inside, and divided into two rooms and an entrance lobby, fitted with windows, stove and flue pipes, and with other conveniences rendering it capable of being inhabited. Moreover, it is certainly intended to be used for some purposes of habitation, in that its primary use is to be that of a classroom for some twenty boys. I do not think it is possible to describe it as an outhouse. It certainly is not an outhouse pertaining to any house erected on the land the subject of the conveyance, and in the collocation in which the expression "outhouse" appears in these conditions, I doubt very much whether a schoolroom built in this way could possibly be treated either as an outhouse, or strictly as pertaining to any house. I think it is an erection in the nature of a house, and that its user for school purposes would constitute a breach of the original conditions.

I only state my conclusions on these matters because it may be, if the case goes further, a higher Court would wish to know the result at which I should have arrived had I held, as I feel myself unable to hold, that the plaintiff had in this case a cause of action. In view, however, of the conclusion at which I have arrived upon the construction of the covenant, I must dismiss the action with costs.

Solicitors: *Wreford Brown, Hewett & Co.; Nicholls & Co., for Hobbs & Brutton, Portsmouth.*

G. M.

In re CALDICOT AND WENTLOOGE ACT, 1884.

ETON COLLEGE *v.* COMMISSIONERS OF SEWERS.

ASTBURY J.

1920

June 25.

[1920. E. 524.]

Rentcharge—Redemption—Rent Owner—"Absolutely entitled in fee simple in possession"—"Empowered to dispose thereof absolutely"—Local Commissioners of Sewers—Local Act—Construction—Conveyancing Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 45.

Where a rentcharge owner is "absolutely entitled thereto in fee simple in possession" or is empowered "to dispose thereof absolutely" or "to give an absolute discharge for the capital value thereof" the landowner wishing to redeem may obtain a certificate of the requisite redemption money under s. 45 of the Conveyancing Act, 1881.

Local commissioners of sewers were entitled to perpetual rentcharges for which the landowners' liabilities to repair sea-walls had been commuted under a local Act, which transferred those liabilities and imposed various duties to and on the Commissioners:—

Held, that the Commissioners, notwithstanding their statutory liabilities and duties in respect of the rentcharges, were absolutely entitled thereto in fee simple in possession within the meaning of s. 45.

Held further on the construction of the local Act that they were also empowered to dispose thereof absolutely within that section.

ORIGINATING SUMMONS.

By the Caldicot and Wentlooge Level Act, 1884 (47 & 48 Vict. c. cxxxiii.), after reciting that the said level was a district under the jurisdiction of Commissioners of Sewers and that various sea walls were repairable by the owners of lands therein and that it was expedient that the Commissioners should be authorized to require those owners to commute their liability to the intent that the Commissioners themselves should be enabled to provide for the necessary repairs. And reciting that the owners of the lands specified in Sch. 1 had abandoned forfeited or surrendered the same to the Commissioners rather than discharge the said liability and it was expedient that the Commissioners should be authorized to sell the same discharged from all liability, it was enacted shortly as follows:—

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By s. 4 "Rentcharge" means any rentcharge for which any liability is commuted under this Act.

By s. 6 the Commissioners may require every owner of lands within the level to commute the liabilities attaching thereto.

By s. 7 any commutation so made shall be in consideration of the payment of an annual rentcharge issuing out of and charged upon the lands in respect of which the liability attaches. The amount of that annual rentcharge shall be such sum as the Commissioners determine to represent the annual liability.

By s. 10 on the amount being determined the Commissioners shall deliver to the owner a certificate specifying the liabilities so commuted and the lands whereon they were chargeable, and those lands shall thenceforth be exonerated from those liabilities which shall thereupon be transferred to and discharged by the Commissioners.

By s. 13 a rentcharge shall be deemed a chief rent and be the first charge on the exonerated lands after any chief rents existing at the time of the creation thereof.

By s. 14 the Commissioners may recover the rentcharge in the same manner as tithe rentcharge is recoverable.

Sect. 15 gave the Commissioners a power of entry in default of payment or sufficient distress.

Sect. 20 authorized the Commissioners to purchase lands by agreement for the purposes of the Act.

Sect. 24 authorized the Commissioners to sell and dispose of the forfeited or abandoned lands specified in Sch. 1 and in the meantime to apply the rents and profits to the purposes of the works fund.

By s. 25 the Commissioners may sell lease exchange or otherwise dispose of for such consideration and on such terms as they think fit and in case of sale either in consideration of a gross sum or of an annual rent or of any payment in any other form "any lands or any interest in any lands acquired by them under this Act" and may sell exchange or dispose of any rents reserved on the sale exchange lease or disposition of such lands.

By s. 26 the proceeds of the sale of any lands or rents shall

be applied in payment of any money borrowed, or shall be carried to the credit of any sinking fund in that behalf, and subject thereto shall be carried to the credit of the works fund.

Sect. 27 authorized the Commissioners to borrow on the security of the rentcharges.

By s. 28 the Commissioners shall establish a fund to be called "the works fund" and pay to its credit all sums received for or in relation to the commutation of liabilities and all other sums specifically directed to be paid to that credit. The works fund shall be applied, First in recouping costs charges and expenses paid out of the general fund. Secondly in paying costs charges and expenses incident to the maintenance and repair of works. Thirdly in paying interest on borrowed moneys. Fourthly in providing a sinking fund for their repayment. Lastly the surplus shall be carried to a reserve fund.

By s. 54, except as expressly provided, nothing in this Act shall lessen prejudice or alter the jurisdictions authorities estates rights interests powers privileges or immunities of the Commissioners.

Under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 35, any commutation made by the Commissioners may be by way of gross or annual charge, and by s. 60 all powers given by the Act shall be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament.

In 1887 the liabilities on the plaintiffs' farms were commuted for annual rentcharges under the local Act and certificates of exoneration given.

In November, 1919, the plaintiffs being desirous of selling the farms free of the rentcharges applied to the Board of Agriculture and Fisheries for a certificate of the redemption money under s. 45 of the Conveyancing Act, 1881. The duties of the copyhold Commissioners under this section are now vested in the Board of Agriculture and Fisheries: Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 48; Board of Agriculture and Fisheries Acts, 1889 and 1903 (52 & 53 Vict. c. 30; 3 Edw. 7, c. 31).

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Sect. 45 as so amended provides shortly as follows :—

By sub-s. 1, where there is a quit-rent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Board shall at any time on the requisition of the landowner certify the amount of money in consideration whereof the rent may be redeemed.

By sub-s. 2 where the person entitled to the rent is "absolutely entitled thereto in fee simple in possession" or is empowered "to dispose thereof absolutely," or "to give an absolute discharge for the capital value thereof," the landowner may pay or tender the amount certified to the person entitled to the rent.

By sub-s. 3 on proof of that payment or tender the Board shall certify that the rent is redeemed.

The Board and the Commissioners were doubtful whether the Commissioners came within the language of sub-s. 2.

On May 14, 1920, the plaintiffs issued this summons against the Commissioners for a declaration that upon the true construction of the local Act and the certificates thereunder the Commissioners were absolutely entitled to the rentcharges in fee simple in possession or empowered to dispose thereof absolutely within the meaning of s. 45.

S. H. Leonard for the plaintiffs. The Commissioners are absolutely entitled to these perpetual rentcharges in fee simple in possession under the local Act, ss. 4, 6, 10, 13, 14, 15. They have also an absolute power of disposition under s. 25. They therefore come within each of the first two alternatives of s. 45, sub-s. 2, of the Conveyancing Act, 1881.

The fact that the redemption money will go to the works fund and be applicable (inter alia) in current repairs is not really material. That would equally have happened if the original commutation had been for a gross sum, which, having regard to the Land Drainage Act, 1861, ss. 35, 60, and the local Act, s. 54, might well have been the case. There is no authority on s. 45 of the Conveyancing Act, 1881, but, if necessary, the decisions on the Lands Clauses Acts can be referred to.

S. R. C. Bosanquet for the Commissioners. The Commissioners do not actively oppose the order, but are bound to point out the difficulties.

In the first place they have at present good annual rentcharges perpetually available as income for current repairs. If these are redeemed, the redemption money goes to the works fund, and being applicable as income may in time be exhausted. No doubt the original commutation might have been for a gross sum to which the same remark would apply. But it was in fact for perpetual rentcharges, and there is no power to alter a commutation once made.

Secondly the Commissioners' ownership of the rentcharges is strictly limited by their statutory duties. They are in no sense absolutely entitled in fee simple.

Lastly s. 25 of the local Act only really enables the Commissioners to sell or dispose of lands acquired under the Act or any interest in lands so acquired. It obviously applies to lands purchased under s. 20 and probably to the abandoned lands mentioned in s. 24, but it is very doubtful whether it applies to these rentcharges. They are of course interests in land, but they are not interests in the lands referred to —namely, lands acquired under the Act.

ASTBURY J., after stating the facts and reading the relevant sections of the local Act and the Land Drainage Act, 1861, continued: The plaintiffs ask for a declaration that the Commissioners are absolutely entitled to the rentcharges in fee simple in possession or empowered to dispose thereof absolutely within the meaning of s. 45 of the Conveyancing Act, 1881.

The Commissioners do not take a hostile attitude but point out certain difficulties.

First they say that if the rentcharges are redeemed the redemption money will be payable to the works fund under s. 28 of the local Act and become available for annual expenditure accordingly. But the local Act was subsequent to the Conveyancing Act, 1881, and as the original commutation if made for a gross sum would have been payable to the works fund under s. 28, there is no real force in this objection.

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In the next place the Commissioners say that they are not absolutely entitled to the rentcharges in fee simple in possession or empowered to dispose thereof absolutely because in point of user their holding is limited by their statutory duties. They admit that they hold the rentcharges in perpetuity, but say they do not hold them absolutely in fee simple, because they have not got the ordinary full powers of dominion of absolute owners.

But as between the Commissioners and the plaintiffs, the Commissioners obtained and the plaintiffs parted with these rentcharges in perpetuity, and in my judgment the Commissioners are absolutely entitled thereto in fee simple in possession within the meaning of s. 45 of the Conveyancing Act, 1881, although their user is restricted by their statutory duties.

In addition to being so entitled they are empowered to dispose of these rentcharges absolutely under s. 25 of the local Act. It is suggested that the words "any lands or any interest in any lands acquired by them under this Act" do not refer to the rentcharges but only to lands acquired by purchase or abandonment or minor interests in those lands. But I cannot put such a limited construction on s. 25 which I punctuate "any lands, or any interest in any lands, acquired by them under this Act." The rentcharges are clearly interests in lands and they were acquired under the Act. The Commissioners have therefore an absolute power of disposition under s. 25.

The plaintiffs are therefore entitled to the declaration they ask.

Solicitors: *Hallowes & Carter; Taylor, Rowley & Lewis, for W. S. Gustard, Newport, Mon.*

G. R. A.

In re EVANS'S CONTRACT.

PETERSON J.

1920

July 13.

[1920. E. 544.]

Will—Assumption of Name and Arms—No Gift Over on non-compliance—Common Law Condition—Conditional Limitation—Necessary Implication—Mere Expression of Desire.

After devising a freehold estate to trustees and giving his daughter and granddaughter and her husband successive equitable life interests therein, with remainder to the use of the granddaughter's first and other sons in tail male, with divers remainders over, the testator provided and declared that every person becoming entitled to the estate as tenant for life or tenant in tail in possession, and the husband of every such person if female and married, should within twelve calendar months of becoming entitled in possession assume the testator's surname and arms. There was no provision for continued user of the name and arms and no gift over on non-compliance with the proviso. Neither the testator's daughter or granddaughter, both of whom succeeded to the estate, nor the husband of either, assumed his name and arms in compliance with the proviso. Objection to title was taken on a sale by the granddaughter under the powers of the Settled Land Acts, on the ground that she was not, and had not the powers of, a tenant for life, her estate, as the purchasers alleged, having ceased by reason of her non-compliance:—

Held, that the vendor could make a good title, for even if the expression of the testator's desire contained a condition, it would be a common law condition of which the testator's heir alone could take advantage by entry, which he had not done; nor was there anything in the will to show that it was the intention of the testator that the estate should go over on non-compliance with his desire, so as by necessary implication to convert the expression of that desire into a conditional limitation.

Gulliver v. *Ashby* (1766) 4. Burr. 1929 applied.

VENDOR AND PURCHASER SUMMONS.

Under the will of Anthony Morris Storer a certain freehold mansion house and estate and certain lands and hereditaments in the county of Berks and elsewhere were devised by the testator to his trustees in trust to pay the income thereof to his wife during her life and after her decease to his daughter Mrs. Fullerton for her life, and from and after her decease to her daughter Mrs. Evans, the vendor, during her life, and from and after the vendor's decease to her husband (if any) during his life so long as he should remain her widower, but from and

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after his decease or second marriage, whichever should first happen, to the use of the first and other sons of the vendor successively according to seniority in tail male, with remainder to the use of the first and other daughters of the vendor successively according to seniority in tail general, with divers remainders over.

The will contained a declaration that the devised lands should "not be saleable under the provisions of the Act to facilitate leases and sales of settled estates or of any other Act or Acts whatsoever," and it also contained the following proviso: "Provided always and I hereby declare that every person who shall become entitled under this my will to the hereditaments hereinbefore devised as tenant for life or tenant in tail in possession shall within 12 calendar months after he or she shall have become so entitled in possession as aforesaid or if he or she shall be under the age of 21 years then within 12 calendar months after he or she shall have attained that age assume the surname and arms of Storer And if the person so becoming entitled as aforesaid shall be a female and shall marry then her husband shall within 12 calendar months after she shall have become entitled in possession as aforesaid or after her marriage (which shall first happen) also assume the said surname and arms."

The testator died on April 5, 1902. His widow died on November 2, 1908. Mrs. Fullerton died on August 9, 1918, and on her death the vendor, who attained the age of twenty-one years in 1910 and had married her present husband in 1913, entered into possession of the mansion house and the trustees were allowing her to receive the rents and profits of the settled estates.

Neither Mrs. Fullerton or her husband nor the vendor or her husband ever assumed the surname and arms of Storer. Mrs. Fullerton was the testator's heiress at law, but Mrs. Evans, the vendor, was not.

The vendor had recently contracted to sell part of the settled land as tenant for life, and the purchasers took the objection that by reason of her non-compliance with the condition of the name and arms clause, she was not a person

entitled to the income of the settled land within s. 58, sub-s. (1.) (ix.) of the Settled Land Act, 1882, nor a tenant for her own life within the meaning of s. 58, sub-s. (1.) (vi.) of the Act, and could not therefore sell the land under the Settled Land Acts, 1882 to 1890, or make a title according to the contract.

This was a summons by the purchasers for the determination of the questions raised by their objection to the title.

Nicholson Combe for the purchasers. By reason of her failure to comply with the proviso in the will directing the assumption of the name and arms of Storer, the life estate of the vendor has already ceased and she does not come within the provisions of s. 58 of the Settled Land Act, 1882, referred to in the purchasers' objections to the title.

The proviso is inapt in speaking of a tenant for life "in possession," because the interests of the tenants for life are equitable, the trustees being in possession. But the proviso contemplates both male and female tenants for life, and no doubt is intended to apply to the vendor. It is not necessary to show that this condition is good as against the legal limitations because conditions annexed to mere trust estates are on a different footing from strict common law conditions: Sheppard's Touchstone, 8th ed., by Atherley, p. 120, n. (k), and this condition would apply to the equitable life estate, and the only way in which effect can be given to it is to say that the life estate ceased on non-compliance. If it were a strict common law condition, which I submit it is not, the heir at law would be the only person who could take advantage of it, and the estate would continue until the heir entered.

This proviso being in a will a conditional limitation in favour of the next taker can be implied, and it is necessary to imply such a limitation in order to give effect to the testator's intention: *Gulliver* v. *Ashby* (1); Fearne on Contingent Remainders, 10th ed., vol. i., p. 425. This is a limitation which cuts down the gift to which it is annexed, and the Court will give effect to it and decide that the estate has ceased.

(1) 4 Burr. 1929.

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Sanger for the vendor. This proviso is merely the expression of a wish. Nothing is said about continuing to use the name and arms, so that if assumed one day, their use could be discontinued the next, which shows the absurdity of giving effect to it.

If it is a common law condition the estate subsists until entry by the heir and no entry has been made : Litt. s. 351 ; Challis on Real Property, 3rd ed., p. 219.

This is not a conditional limitation, but if it is, there is no gift over and none can be implied. If a condition at all, it can only be a common law condition. Such a condition can only affect the legal estate, which in this case is in the trustees, and that would lead to an absurdity.

PETERSON J. stated the material provisions of the will and continued. The vendor is the daughter of Mrs. Fullerton, and objection has been taken to the title by the purchaser that inasmuch as she did not within twelve calendar months from the time when she became entitled in possession to the hereditaments take and assume the surname and arms of Storer, her life interest has come to an end, and that she is not in a position to exercise any of the powers under the Settled Land Acts. Now if this be a common law condition—assuming it to be a condition—then the only person entitled to avail himself of it would be the heir at law, and the estate remains until the heir has made an entry, and the heir has not in fact entered. If then this is a common law condition the result is that Mrs. Evans, the vendor, is entitled to the income of the property until the heir has made an entry, which he has not done, and consequently she is able to exercise the statutory powers of a tenant for life. But the real argument is put in this way—it is said that this direction is in effect a conditional limitation and that it must be so regarded in order to give effect to what the testator intended by his will—namely, that if a tenant for life did not take and assume the name and arms in question the estate was to go over to someone else. A somewhat similar question arose in *Gulliver* v. *Ashby* (1), and on this point

(1) 4 Burr. 1929, 1942.

Yates J. said: "This is certainly not a condition precedent. The question then is, 'whether it be a conditional limitation'? I am clearly of opinion, it is not. Doubtless, 'tis not an express limitation; and an implication of one can only be made, in order to effectuate the testator's intention; and must be a necessary implication to that purpose." What is there in the present case to show that the testator undoubtedly meant that if Mrs. Evans failed to take and assume the surname and arms of Storer, the estate was to go over as if she were dead? I do not find anything to show that that was the intention of the testator. It may be that this was merely the expression of a desire. It is simply a declaration that each of the specified persons is to assume the surname and arms, and nothing whatever is said as to what is to happen to the estate if any of those persons fails to carry out the expression of the desire.

In my opinion this is not a conditional limitation, and Mrs. Evans can make a good title. The purchaser must pay the costs of the summons.

Solicitors for the purchasers: *Torr & Co., for Hewett & Churchill, Reading.*

Solicitors for the vendor: *Young, Jackson, Beard & King.*

R. M.

P. O. LAWRENCE J.

1920

May 14, 17, 18, 19, 20.

DUNN *v.* CHAPMAN.

[1919. D. 1037.]

Vendor and Purchaser—Lis pendens—Memorandum for Registration—Name—Description—Blanks—Practice—Judgments Act, 1839 (2 & 3 *Vict.* c. 11), *s.* 7.

Sect. 7 of the Judgments Act, 1839, requires that the memorandum for registration of a lis pendens shall contain (amongst other things) "the name . . . . and the title, trade or profession" of the person whose estate is intended to be affected thereby, and that these particulars shall be entered in a book "in alphabetical order by the name" of the person whose estate is intended to be affected:—

Held, that the entry in the memorandum of the surname with the initials of the Christian names of the person whose estate is to be affected is a sufficient compliance with the section, although it is desirable to enter the full Christian names if they are known to the applicant at the time of the registration.

Held, also, that the words "title, trade or profession" must be read with the qualification "if any," and therefore, where the person whose estate is to be affected has no title or occupation, it is not necessary to enter that fact in the memorandum.

WITNESS ACTION.

At the date of the sale to the plaintiffs after mentioned the defendant Chapman was carrying on the business of a motor garage proprietor and motor engineer at his leasehold premises, No. 219, Grove Road, Bow, London, and a leasehold garage, No. 36, Wermington Road, Bow, both of which premises he held on underleases expiring at Lady Day, 1936; and he advertised the same for sale by public auction on July 17, 1919, together with his motor cars and stock in trade. The Particulars stated that "Mr. J. W. Chapman" was selling "owing to ill health."

On July 16, 1919 (the day before the auction sale), Chapman sold by private treaty his said leasehold premises and garage to the plaintiffs for 500*l.*, the purchase to be completed on August 11 following. At the auction sale on July 17 the plaintiffs resold the leasehold premises and garage to a Mr. Mills at a profit, and also bid for and purchased some of Chapman's stock in trade. Chapman refused to complete his contract with the plaintiffs, alleging (contrary to the fact)

that the plaintiffs on July 16 made a contemporaneous verbal agreement with him to purchase some of his motor cars at the auction sale at certain prices, and on August 26 the plaintiffs served a writ on Chapman for specific performance of the contract of July 16, 1919; and on September 3 the plaintiffs' solicitors registered the action as a lis pendens.

On September 22 Chapman agreed to sell his said leasehold premises and garage to one Clogg for 500*l.* and completed the sale on October 7. On this occasion Messrs. Bishop & Fenton-Jones, the solicitors of Clogg, acted both for Clogg and Chapman, and Chapman deliberately concealed from them his contract with the plaintiffs and their pending action. Messrs. Bishop & Fenton-Jones made no searches and Clogg was in fact a purchaser for value without notice. The plaintiffs first heard of the sale to Clogg on October 21 and at once amended their writ by adding Clogg as a defendant. The case does not call for a report except on the question of the validity of the registration of the lis pendens.

The Judgments Act, 1839, s. 7, enacts that no lis pendens shall bind a purchaser or mortgagee without express notice thereof, "unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and the Court of equity, and the title of the cause or information, and the day when the bill or information was filed," is left with the Senior Master of the Court of Common Pleas, who shall enter the same particulars in a book "in alphabetical order, by the name of the person whose estate is intended to be affected by such lis pendens. . . . ."

By the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. 51), a register of writs and orders affecting land was established and is kept at the office of the Land Registry; and by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), all registers of lites pendentes, judgments, etc., in the central office of the Supreme Court were transferred to and are now kept at the Land Registry Office.

It appeared from the evidence of an official at the Land

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Registry that the practice is to require the full Christian names as well as the surname to be entered in the memorandum for registration, and also a short description of the property affected by the lis pendens; and that the register is kept alphabetically, the surname being taken as the index name. If the Christian names are not known at the time of registering the lis pendens, the practice is to accept the memorandum and to require that the Christian names shall be supplied after the defendant has entered an appearance to the writ. In the present case the plaintiffs' solicitor, Mr. Waterson, did not know the Christian names of the defendant Chapman, who was sued in the writ as "J. W. Chapman," and therefore in the memorandum for registration under the heading "name" he entered "Chapman, J W (Mr.)," and under the heading "title, trade or profession" he made no entry because he knew that the defendant Chapman had sold his property and business owing to ill health and assumed that he had given up business. On presenting the memorandum for registration the official drew attention to the fact that the initials only of the Christian names of the defendant Chapman were entered and that no entry was made under the heading "title, trade or profession." Mr. Waterson explained that he did not know the Christian names and stated that Chapman had no occupation. The memorandum was accepted, Mr. Waterson agreeing to supply the Christian names later on. This he did on October 23 when the full Christian names "James William" were entered in the memorandum and the word "(Mr.)" was struck out.

Jenkins K.C. and *R. H. Hodge* for the plaintiffs. The onus is on the defendants to show that the registration of the lis pendens on September 3 was invalid.

Ward Coldridge K.C. and *J. W. Jones* for the defendant Clogg. The purport and effect of registering a lis pendens is explained in *Bellamy* v. *Sabine*. (1) Sect. 7 is imperative and must be construed strictly, and we contend that the registration does not comply with the section on two grounds.

(1) (1857) 1 De G. & J. 566, 584.

In the first place, on the true construction of the section, the memorandum does not contain "the name" of the person unless the full Christian name or names as well as the surname are given. A person's name is his full name and not merely his surname. The purpose is identification, and the surname with initials is not enough. It may be that in the latter part of the section the word "name" refers to the surname, but it is submitted that in the first instance the full name—i.e. the surname and the Christian names—must be inserted, and therefore the requirements of the section in regard to "the name" have not been complied with. Secondly, on the evidence the defendant Chapman did not retire from business until October and under the heading "title, trade or profession" should have been described as a motor garage owner and motor engineer. But if he had retired from business by September and had no occupation, the word "none" should have been entered under that heading. It is submitted however that he was still carrying on business during August and September. He kept on his foreman and was slowly winding up his business and disposing of the unsold portion of his stock. There is no authority on the section, but it is submitted that the analogy of cases like *Brandling* v. *Plummer* (1) and *Ex parte Lewis* (2) applies, and that the entries in the memorandum were insufficient and inoperative, and therefore the defendant Clogg, who is in fact a bona fide purchaser for value without notice, is protected.

G. D. Johnston for the defendant Chapman adopted the same line of argument.

Jenkins K.C. There has been some conflict of judicial opinion on the doctrine of lis pendens, and the law is now summed up in *Price* v. *Price*. (3) Clogg was an innocent purchaser, but his solicitors were negligent in not making a search and he is affected with notice of the lis pendens. There is no substance in the objections to the sufficiency of the registration. Sect. 7 is not very clearly drawn and must be construed reasonably. It says the memorandum is to

(1) (1857) 26 L. J. (Ch.) 326. (2) (1834) 2 Ad. & E. 135.
(3) (1887) 35 Ch. D. 297, 302.

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contain "the name" of the person whose estate is to be affected, that means the surname. There is nothing in the section which requires the Christian names to be given. The name given must be sufficient to identify the person, and the plaintiffs' solicitor followed the description of the defendant Chapman in the writ. Then the words "title, trade or profession" must be qualified by the words "if any," and on the evidence Chapman had not any trade or profession at the time of the registration. He was not then carrying on any business. He had no occupation. The analogy of the cases under the Bills of Sale Act, 1878, on the occupation of a grantor applies: *Ex parte Young* (1); *Sharp* v. *McHenry*. (2) It is clear that if a search had been made complete information would have been obtained.

Ward Coldridge K.C. in reply.

P. O. LAWRENCE J., after dealing with the main issue in the action and holding that there was no agreement by the plaintiffs to purchase any of the motor cars or stock in trade of the defendant Chapman, continued: This leaves me to deal with the defence of the defendant Clogg. The action was commenced on August 6, 1919. On September 3, 1919, it was registered as a lis pendens. On October 7, 1919, Chapman sold and assigned the property to the defendant Clogg, concealing the contract of July 16, 1919, and the fact that this action was pending; Clogg's solicitors did not search at the Land Registry Office for lis pendens, and Clogg acquired the property without knowledge or notice of the contract of July 16, 1919, or of the pendency of this action. The defendant Clogg contends that the registration on September 3, 1919, of the lis pendens was defective in two particulars. He says it did not comply with s. 7 of the Judgments Act of 1839, first, in that the memorandum or minute left for registration did not contain the Christian names of the defendant Chapman; and secondly, in that it did not state his title, trade or profession.

Now the section requires "the name" of the person whose

(1) (1880) 42 L. T. 744. (2) (1887) 38 Ch. D. 427, 450–1.

estate is intended to be affected by the registration to be contained in the memorandum which is to be left for registration. In the present case the plaintiffs' solicitors, whose duty it was to register the lis pendens, did not know the Christian names of the defendant Chapman. In the writ which had been issued against him his Christian names are not given, and he is sued as J. W. Chapman. Accordingly in filling up the form of memorandum at the Land Registry the solicitor inserted the surname "Chapman" and, as the Christian names, the initials "J. W.," with a "Mr." after the "W." in order to show the sex of the defendant Chapman. In my opinion the particulars inserted in the memorandum were sufficient within s. 7 as regards "the name" of the person whose estate was sought to be affected by the registration. It is the practice in the Land Registry when the Christian names of the person whose estate is sought to be affected are not known, to accept the memorandum without the Christian names and to ask the applicant to forward the Christian names when the person enters an appearance in the action, and that course was followed in the present case. The Christian names of the defendant Chapman, however, were not supplied until after the sale to Clogg had been completed when they were added to the registration. I therefore have to consider the question whether, at the time Clogg purchased, the memorandum was a sufficient memorandum within the meaning of s. 7. The section does not in terms require that the Christian names and the surname of the person whose estate is sought to be affected should be given in full. No doubt it will always be advisable to give the Christian names if those names are known to the applicant and it is the usual practice to give the Christian names in every case where they are known, but I hold it is not essential to do so. In my opinion the surname with the correct initials of the Christian names is substantially "the name" of the person within the meaning of s. 7. It is to be observed that in a later part of the section, where it deals with the entry of the particulars in the register, it is provided that those entries should be made in alphabetical order, in accordance with the

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name of the person whose estate is intended to be affected. In that case " the name " of the person obviously refers solely to the surname of the person. Whilst not deciding that the insertion of a mere surname in the memorandum to be left for registration would be sufficient under the earlier part of the section, I hold that in this case and in other similar cases, it is sufficient if the surname is given with the initials of the Christian names.

The second point is that the memorandum did not contain the title, trade, or profession of the defendant Chapman. The first question which arises on that is, whether the defendant Chapman at the date of this registration had any title, trade or profession. On the facts proved before me I hold that he had not. It is not suggested that he had a title of dignity, which Mr. Ward Coldridge and Mr. Jenkins concurred in admitting is the meaning of " title " in that section, but it is said that he had a trade or profession. Now the business which he was carrying on in the summer of 1919 was that of a motor car and motor garage proprietor, consisting of the trade or business of repairing, housing and letting out of motor cars. The defendant Chapman has however stated that the sole aim and object of the sale on July 17, 1919, was to enable him to go out of business altogether owing to ill-health. He has further stated that he did in fact go out of business altogether from and after the sale. It is true that he kept his foreman, Green, in his employment until some time in October, and that the latter stated that, in addition to realizing the stock which had not been sold at the sale in July, he did some jobs in the way of wedding parties and race meetings, but in substance, there was no business being carried on by the defendant Chapman. I therefore hold that the defendant Chapman had ceased from the time of the sale in July to carry on any business, and that at the time of the registration of this action as a lis pendens he was what he has since described himself in an affidavit in this action to be, a man of no occupation. It has been further argued that if the person whose estate is sought to be affected has no title and is not carrying on any trade or profession, it is necessary,

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in order to comply with the Act, to state that fact in the memorandum to be left for registration. In my judgment the obligation in s. 7 to state the title, trade or profession must necessarily be qualified by the words "if any," otherwise it would be impossible to register a lis pendens against a person who has no title, trade or profession. I hold, further, that it is not necessary to state that the person whose estate is to be affected has no title, trade or profession, if that be the fact. No such obligation is imposed by the Act. In the result I reject both of the objections taken on behalf of the defendant Clogg to the registration of the lis pendens, and hold that it was a good registration. I therefore give judgment for specific performance of the agreement of July 16, 1919, against both defendants with costs.

Solicitors: *Bradshaw & Waterson; Bishop & Fenton-Jones.*

H. L. F.

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In re ASHTON.

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[1920. A. 473.]

Will—Construction—Absolute Gift—Gift over on Death if then mentally unfit to manage Affairs—Validity—Repugnancy.

A gift over by will of real and personal property in the event of the original absolute donee dying mentally unfit to manage his own affairs is repugnant and void as tending to contravene the law by providing a different devolution of the property from that prescribed by law in the event of an absolute owner dying intestate.

The statement of the general law by Turner L.J. in *Holmes* v. *Godson* (1856) 8 D. M. & G. 159–60 applied.

ADJOURNED SUMMONS.

By his will dated March 26, 1917, Harry James Ashton after appointing his sister the defendant Clara Ann Ashton and the plaintiff S. J. Ballard executors of his will and making

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certain pecuniary bequests continued: "I give devise and bequeath unto my sister Clara Ann Ashton all my real and personal property whatsoever and wheresoever belonging to me . . . . subject to the payment of my just debts funeral and testamentary expenses or any charges upon my real estate. Should my sister Clara Ann Ashton at the time of her decease be mentally unfit to manage her own affairs then it is my will and wish that all my real and personal property above mentioned shall be given devised and bequeathed to my brother Edmund Thomas Ashton of Croydon in the County of Surrey his heirs and assigns." The testator subsequently made two codicils dated respectively August 25, 1918, and June 25, 1919, by which he increased a legacy of 10*l.* given to his housekeeper by his will first to 50*l.* and then to 300*l.*, and in all other respects he confirmed his will.

The testator died on September 16, 1919. At the date of his will Clara Ann Ashton was in possession of her faculties, but towards the end of 1918 she became unable to manage her affairs, and by an order dated October 30, 1919, a receiver of her estate was appointed under the Lunacy Acts. Clara Ann Ashton made a will while of sound mind on August 8, 1917, by which she purported to give her residuary estate to the testator.

This summons raised the question whether under the will of the testator the defendant Clara Ann Ashton was absolutely entitled to the real and personal estate devised and bequeathed to her free from any executory limitation over on her death in any event or whether the devise and bequest to her was subject to a valid and effectual executory limitation over in favour of the defendant Edmund Thomas Ashton in the event of the defendant Clara Ann Ashton being at the time of her death mentally unfit to manage her own affairs.

H. T. Methold for the executor.

Winterbotham for Clara Ann Ashton. There is here no gift over but merely an expression by the testator of how he would wish the property to go in the contingency contemplated. But in any case the gift over is invalid as being repugnant

to the absolute gift to Clara Ann Ashton. A gift over that is intended to qualify the donee's power of disposition is bad and so also is a gift over contingent upon the donee's dying intestate. The first is held to be repugnant on the ground that an absolute interest in property carries with it by law a right of disposition and the second because it interferes with the course of devolution settled by law in the case of intestacy: *Holmes* v. *Godson* (1); *Gulliver* v. *Vaux* (2); and *In re Dixon.* (3) See also *In re Parry and Daggs.* (4) Here the gift over is invalid, because it at least tends to prevent the devolution provided for by law in the case of an intestacy.

P. M. Walters for Edmund Thomas Ashton was only called upon on the second point. The gift over is not repugnant. "The general law is that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest": per Kay J. in *In re Dugdale.* (5) No doubt one of these natural incidents is the course of its devolution on an intestacy: *Shaw* v. *Ford* (6); see also *Ross* v. *Ross.* (7) But the contingency here upon which the gift over is made is personal to the original donee.

[SARGANT J. The result of it would be to make the property go otherwise than on an intestacy in that event.]

It is not directed to intestacy. A person may cease to have capacity to manage his affairs after he has made a valid will which will take effect at his death. Indeed that is the position here. An absolute gift can be cut down to a limited interest by a gift over but it cannot be left absolute with a gift over that is inconsistent with it: *Henderson* v. *Cross.* (8) Here the gift over has the former and not the latter effect. The Court has never gone so far as to hold such a gift over as this to be repugnant and therefore void. Gifts over have

(1) (1856) 8 D. M. & G. 152.
(2) (1746) 8 D. M. & G. 167n.
(3) [1903] 2 Ch. 458.
(4) (1885) 31 Ch. D. 130.
(5) (1888) 38 Ch. D. 176, 181.
(6) (1877) 7 Ch. D. 669, 673.
(7) (1819) 1 Jac. & W. 154.
(8) (1861) 29 Beav. 216, 220.

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been held valid when limited on the primary donee selling out of the family: *In re Macleay* (1); becoming a nun: *In re Dicksons' Trust* (2); marrying a non-Jew or forsaking the Jewish religion: *Hodgson* v. *Halford* (3); becoming a member of the Roman Catholic Church or of any sisterhood: *Wainwright* v. *Miller*. (4) The most that can be said against the gift over here is that it is intended to take effect upon a condition tending towards an intestacy and that is not enough to render it void.

Winterbotham in reply.

Cur. adv. vult.

July 30. SARGANT J. delivered a written judgment in which after stating the question raised by the summons and the material part of the testator's will he continued: The testator's sister seems to have been in possession of her faculties at the date of his will—namely, in March, 1917—but her mind subsequently failed through old age; and towards the end of the year 1918, before the death of the testator, a receiver was appointed of her estate under the Lunacy Acts. The receiver is now desirous of ascertaining whether the gift over in the will to the testator's brother Edmund Thomas Ashton is effective; since if it is ineffective it may be desirable to apply part of the capital of the estate for the benefit of the lunatic.

It was first suggested on the part of the receiver that the gift over is merely the expression of a wish or desire on the part of the testator and so is not binding or effectual. I cannot take this view. The words of the gift over are to my mind imperative. A circumstance often relied on in favour of the other view—namely, that the testator desires the property to be devised or bequeathed by the original donee and so contemplates his absolute dominion—is not applicable here. For the testator is here in terms contemplating an event in which the donee will be incapable of exercising any ordinary power of disposition. The testator notwithstanding

(1) (1875) L. R. 20 Eq. 186.
(2) (1850) 1 Sim. (N. S.) 37.
(3) (1879) 11 Ch. D. 959.
(4) [1897] 2 Ch. 255.

the rather peculiar language he has used is not, in my judgment, contemplating the intervention of the donee or any one else in the devise and bequest of the property; but is making this devise and bequest directly and for himself.

The second and more serious contention on the part of the receiver is that the gift over is repugnant to the absolute interest previously given to the testator's sister and is therefore void. In regard to this question a number of cases are cited of which *Holmes* v. *Godson* (1), *Shaw* v. *Ford* (2) and *In re Dixon* (3) are perhaps the most important. For the purpose of the present case it is not in my judgment necessary to travel outside the law as stated in these cases.

It is of course clear that under the extreme freedom of disposition allowed to testators by our law a gift by will which is absolute in the first instance may in general be modified by subsequent words cutting down or divesting the gift on any contingency the testator may think fit to select. But the contingency must not be so selected as to run counter to the general policy of the law. Thus gifts over on any of the following contingencies, amongst others, are bad—namely, (*a*) any contingency that is too remote, (*b*) the contingency of any marriage whatsoever, (*c*) the contingency of alienation, (*d*) the contingency of bankruptcy, or (*e*) the contingency of intestacy. The effect of recognizing the contingent gift would in the third instance be to deprive the owner of a necessary right of property at the very moment when he seeks to exercise this right, and would in the fourth and fifth instances be to alter one of the legal incidents of property by providing that, on the occurrence of the very contingency on which the law prescribes a certain course of devolution, this particular item of property shall follow a different course of devolution. And accordingly in either the third, fourth or fifth instance the gift over on the contingency is held to be repugnant to the ownership previously vested in the donee and to be void.

Here, if the gift over had been conditional to take effect

(1) 8 D. M. & G. 152. (2) 7 Ch. D. 669.
(3) [1903] 2 Ch. 458.

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on the intestacy of the donee it would clearly have been repugnant. Is it repugnant because it is a gift over on the death of the donee under such circumstances as will most probably, though not certainly, result in an intestacy? It seems to me that this question must be answered in the affirmative.

In the judgment of Turner L.J. in *Holmes* v. *Godson* (1) the principle is stated in the following words: "The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heir, and this disposition"—that is, the disposition by the testator in that particular case—"tends directly to contravene the law and to defeat the policy on which it is founded." The disposition in the present case falls, in my judgment, within the mischief pointed out in this passage. For it clearly tends to contravene the law though it might not operate in every event, and further (a not unimportant point) this contravention or probable contravention of the law is not a mere casual result of words used for some other purpose but was deliberately intended by the testator. If a testator proceeded to divest an estate on the original devisee falling into such embarrassed circumstances as to be likely to become bankrupt, such an executory limitation would in my view be as repugnant and void as if the gift over were conditioned on the donee becoming actually bankrupt. And I cannot differentiate in principle between such a case as that and the present case under which the occasion of the gift over is the occurrence of death under such circumstances as to be likely to be accompanied by intestacy.

It is curious that in this case the testator has used a form of words which in the events which have happened would, if effective, probably have defeated his own intention, since his sister even if remaining mentally incapable to her death has previously made a testamentary disposition that will apparently be effective on her death. But this fact is irrelevant for the present purpose.

(1) 8 D. M. & G. 159, 160.

I propose to declare that the defendant Clara Ann Ashton is absolutely entitled to the property in question.

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Solicitors : *Ruston, Clark & Ruston, agents for Gepp & Sons, Chelmsford ; Official Solicitor.*

H. C. G.

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[1919. G. 766.]

Vendor and Purchaser—Contract—Sufficiency of Memorandum—Pleading signed by Counsel—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

G. sued B. for specific performance of a contract to sell a house. Defence, signed by counsel, that B. had already contracted to sell to E., and counterclaim for rescission. G. then added E. as defendant. E. relied on his contract, and counterclaimed for a declaration that he was entitled to the house free from G.'s claim. G., in answer to E., relied on the Statute of Frauds:—

Held, that B.'s defence (which contained all the terms of E.'s contract) was a sufficient memorandum within the statute.

Smith v. *Webster* (1876) 3 Ch. D. 49 ; *John Griffiths Cycle Corporation* v. *Humber & Co.* [1899] 2 Q. B. 414 ; *Daniels* v. *Trefusis* [1914] 1 Ch. 788 ; *North* v. *Loomes* [1919] 1 Ch. 378 applied.

Whether it was open to G. to rely on the statute, quære.

WITNESS ACTION.

The plaintiff claimed specific performance of a contract in writing dated April 23, 1919, for the sale to him by Mrs. Annie E. Bass of freehold hereditaments at Hornsea known as Burton House. Mrs. Bass defended the action on the grounds (1.) that she had been induced to sign the contract by the undue influence of the plaintiff and a Mr. Lord, who took advantage of her unprotected position, age and weakness, and refused to give her an opportunity of consulting her relatives ; (2.) that in December, 1918, she had sold Burton House to a Mr. Stanley Earle. Para. 4 of the defence, which was signed by counsel, was : "Prior to the date of the said agreement, namely,

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on or about the 17th December, 1918, the defendant had agreed to sell the said premises Burton House to Stanley Earle in consideration of his paying her the sum of 2*l.* a week during her life and allowing her to retain possession of Burton House during her life or for so long as she should desire." That allegation was based on a letter from Mrs. Bass to Mr. Earle, dated December 17, 1918, and headed Burton House, as follows: "My dear Stanley, I have thought things out generally, and have come to the conclusion that if you are still in the same mind to allow me an annuity of 2*l.* per week as per agreement formerly offered and still retain possession of my house during my lifetime would be the easiest way for me. The income to commence immediately, as I am fast getting to the end of my resources and have already lost many weeks through not deciding sooner. I see no prospect of getting a smaller house, the one in Cliff Lane is not to let the owner at present occupying it. I called to-day. Can you come and see me, or let me know when you will be at home, to get things fixed up as soon as possible. Yours affectionately, ANNIE E. BASS." The offer so made was accepted. The 2*l.* a week was paid. Mrs. Bass continued in possession. But the matter had not yet been carried through to completion. Further, she counterclaimed for rescission of the contract of April 23, 1919. The plaintiff, upon that defence, joined Earle as a defendant. Earle delivered a defence relying on the earlier agreement with him, and counterclaiming for specific performance of his agreement and a declaration that he was entitled to Burton House free from all right, claim, and interest of the plaintiff. His counsel stated at the hearing that he did not ask for specific performance, but only for the declaration. In answer to Earle's claim, the plaintiff relied on the Statute of Frauds.

G. B. Hurst K.C. and *Northcote* for the plaintiff. There is no enforceable contract prior to Mrs. Bass's contract with the plaintiff. There is no memorandum of the alleged contract between her and Earle sufficient to satisfy the

Statute of Frauds. The letter of December 17, 1918, does not contain all the terms of the alleged bargain. There has been no part performance: Fry on Specific Performance, 5th ed., §§ 584, 613. There is no authority for saying that counsel signing pleadings is an agent to bind his lay client within the statute; a solicitor is not: Fry on Specific Performance, 5th ed., §§ 526, 532; nor an auctioneer: *Buckmaster* v. *Harrop*. (1) If an action were brought against Mrs. Bass by Earle for specific performance, and she did not plead the statute, the present plaintiff could intervene and compel her to do so.

Alternatively, if the letter is a sufficient memorandum, it is a "settlement" within the definition of the Settled Land Act, 1882, and it is Mrs. Bass's duty to do everything she can to carry out her contract: *Bain* v. *Fothergill* (2), per Lord Hatherley. As tenant for life she is in a position to give the plaintiff a complete title. The only objection that can be raised to that is that there are no trustees for the purposes of the Settled Land Act. But the answer to that is that it is a matter not of title but of conveyance: *Braybrooks* v. *Whaley*. (3) It would be her duty to apply to the Court for appointment of trustees.

Preston K.C. and *G. G. Solomon* for Earle. The plaintiff has no right to plead the Statute of Frauds, which Mrs. Bass has not raised. Apart from her, he cannot plead it. There is a sufficient contract within the statute. It can be shown by parol what "as per agreement formerly offered" in the letter meant. The defence signed by counsel is a sufficient memorandum within the statute: Fry on Specific Performance, 5th ed., § 283; *Barkworth* v. *Young* (4); *Daniels* v. *Trefusis* (5), which is a very strong case. The plaintiff cannot deny the existence of an agreement which is set up in the pleadings and not denied.

As to the letter constituting a "settlement" within the Settled Land Act.

(1) (1802) 7 Ves. 341.
(2) (1874) L. R. 7 H. L. 158, 209.
(3) [1919] 1 K. B. 435, 439, 440.
(4) (1856) 26 L. J. (Ch.) 153.
(5) [1914] 1 Ch. 788.

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[RUSSELL J. If it is a "settlement" it must be a sufficient memorandum within the Statute of Frauds.]

It was anticipated that the other side would say the case came within s. 58, sub-s. 1 (ix.) There is no authority for saying Mrs. Bass can be compelled to get trustees appointed. It may be that a tenant for life can effectually enter into a contract to sell although no trustees are in existence, but if the purchaser knows that there are none he knows that notice cannot be given under s. 45: Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., p. 446; *Hatten* v. *Russell.* (1)

Mathew K.C. and *L. F. Potts* for Mrs. Bass. Though there has been no fraud, yet in this case of an old lady of seventy-seven, incapable of bargaining or dealing at arm's length, who sold at an inadequate price, and without independent advice, the Court will not allow the transaction to stand: *Baker* v. *Monk* (2); *Clark* v. *Malpas.* (3) The question on the Statute of Frauds is whether authority to sign a particular document is authority to sign a memorandum within the statute whatever the purpose of the document may be.

[RUSSELL J. Sargant J. goes a long way in the direction of saying it is, in *Daniels* v. *Trefusis.* (4)]

It is a mere question of evidence. In pleadings counsel states his client's version of what the facts are.

Damages as limited in *Bain* v. *Fothergill* (5) are all the plaintiff can get: per Lord Chelmsford, quoted in *Gas Light and Coke Co.* v. *Towse.* (6) Even if *Bain* v. *Fothergill* (5) does not apply, there are no damages.

G. B. Hurst K.C. in reply. What passed to the plaintiff on April 23, 1919, was only what Mrs. Bass herself possessed, and, if her contract with Earle was not then enforceable, her counsel could not afterwards by his pleading make it so.

Cur. adv. vult.

(1) (1888) 38 Ch. D. 334.
(2) (1864) 4 D. J. & S. 388.
(3) (1862) 4 D. F. & J. 401.
(4) [1914] 1 Ch. 788.
(5) L. R. 7 H. L. 158.
(6) (1887) 35 Ch. D. 519, 543.

July 30. RUSSELL J. after stating the facts and holding that the letter of December 17, 1918, as explained by the oral evidence, was an offer by Mrs. Bass to sell Burton House to Mr. Earle in consideration of an annuity of 2*l.* a week for her life, she retaining a life interest in the property during her life as well, that the offer was accepted and a contract made, and that the terms of the contract had been duly performed. The next question is, is there any sufficient memorandum within the statute? For this it is necessary to find a memorandum signed by Mrs. Bass or by an agent by her thereunto lawfully authorized. In my opinion the letter of December 17, 1918, is not a sufficient memorandum. There is nothing in it stating in terms what Mrs. Bass is going to do in return for the 2*l.* a week. It might as well relate to the grant of a long term of years in Burton House as to a conveyance of the fee.

It is however contended by counsel on behalf of Mr. Earle that there is in existence a memorandum containing all the terms and signed by an agent of Mrs. Bass thereunto lawfully authorized, and they point to the defence of Mrs. Bass delivered in this action on July 31, 1919 (before Earle was joined as a party), and signed by her counsel. [His Lordship read para. 4 of the defence.] That paragraph contains all the terms of the bargain, but is the document signed by an agent within the statute? There appears to be no direct authority upon the point. It has been held that a solicitor instructed on behalf of one of the parties to prepare a formal contract has no authority to sign for his client any memorandum of the contract within the statute: *Smith* v. *Webster*. (1) That case has been explained by the Court of Appeal in *John Griffiths Cycle Corporation* v. *Humber & Co.* (2), and by Sargant J. in *Daniels* v. *Trefusis*. (3) In the former case it was held that it was not necessary, in order to satisfy the statute, that the principal should have authorized the agent to sign the document as a record of the contract. In *Daniels* v. *Trefusis* (3), Girdlestone,

(1) 3 Ch. D. 49.
(2) [1899] 2 Q. B. 414.
(3) [1914] 1 Ch. 788.

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acting for Daniels, had sold land to Trefusis. There was no contract or memorandum signed by Trefusis. Girdlestone alleged afterwards that he had bought the land from Daniels, and had resold it on his own account to Trefusis; and he sued Daniels for specific performance of his alleged contract with him. Daniels's solicitors, being desirous of obtaining a proof of Trefusis's evidence, obtained from his solicitors a statement of what had passed between Trefusis and Girdlestone and also answers by Trefusis to certain specific questions. These documents were not signed by Trefusis but were enclosed in letters signed by his solicitors. The solicitors were authorized by Trefusis to forward these documents. Girdlestone's action having failed, Daniels sued Trefusis for specific performance of the contract between them. The Statute of Frauds having been pleaded, it was held that the two documents and the letters signed by the solicitors constituted a sufficient memorandum signed by the agents of Trefusis, his solicitors having authority to forward the particular documents. "It seems to me," says Sargant J. (1), "that the unintentional by-product of satisfying the Statute of Frauds may be produced as completely by a note or memorandum signed by an agent of the party as by a note or memorandum signed by the party himself, provided, of course, that the agent had authority to sign the particular note or memorandum." I may refer also to *North* v. *Loomes* (2), where Younger J. held that authority to a solicitor to complete a contract carried with it authority to affirm the existence and validity of the contract; and that, accordingly, a letter signed by the purchaser's solicitor, referring to a document signed only by the vendor, was a memorandum signed by the purchaser's agent by him thereunto lawfully authorized.

To apply the principle of these authorities to the present case, no one can doubt that Mrs. Bass's counsel was by her authorized to sign the defence and to allege in the defence the existence and terms of her contract with Earle as an answer to the claim of the plaintiff. It matters not that the fact

(1) [1914] 1 Ch. 799. (2) [1919] 1 Ch. 378.

that a memorandum within the Statute of Frauds would thereby be brought into existence was not present to the minds of either counsel or client. I am of opinion that counsel being the authorized agent to sign the particular document is an agent "thereunto lawfully authorized" within the meaning of the statute, and that the document, containing as it does all the necessary terms, is a proper memorandum within the statute. In this view it is unnecessary to consider or decide further points which were discussed—namely, whether there had been sufficient part performance of the agreement, and whether it was open to the plaintiff in the action to rely on the statute as a defence to Earle's counterclaim.

The result is that there is in existence an agreement for the sale of Burton House to Earle, prior in point of date to the plaintiff's contract; and that to an action by Earle against Mrs. Bass to enforce the Earle contract the Statute of Frauds affords no defence.

[His Lordship then considered the question of undue influence raised by Mrs. Bass in her defence and counterclaim, and was satisfied, on the evidence, that there was no ground for setting aside the contract with the plaintiff on that account. He continued:] The result is that, although apart from the existence of the Earle contract the plaintiff has a good enforceable contract, he cannot in view of that contract get specific performance.

I must notice an ingenious argument advanced by counsel on behalf of the plaintiff. It was said that, notwithstanding the Earle contract, Mrs. Bass was entitled to sell, and effectively to sell, the property to the plaintiff. This was on the footing that by virtue of the Earle contract Mrs. Bass was equitable tenant for life of Burton House, and could make a title under the Settled Land Acts. In other words, that the letter of December 17, 1918, created or was a settlement for the purposes of the Settled Land Act, 1882. I cannot accede to this view. Indeed it is wholly inconsistent with the correct and successful argument of the plaintiff that that same letter did not sufficiently contain the terms

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of the Earle contract so as to be a memorandum thereof within the Statute of Frauds.

This is a case, putting it at its highest against Mrs. Bass, of a person contracting to sell real estate knowing that she had no title to it or means of acquiring it. It is directly within the language of Lord Chelmsford in *Bain* v. *Fothergill.* (1) The purchaser cannot recover damages beyond the expenses he has incurred by an action for breach of contract. The action will be dismissed, and, in view of the unfounded charges contained in the defence of Mrs. Bass, will be dismissed as against her without costs. The counterclaim of Mrs. Bass will be dismissed with costs. There will be the declaration asked for by Mr. Earle and the plaintiff will pay his costs of action and counterclaim.

Solicitors for the plaintiff: *Gamlen, Bowerman & Forward, for Locking, Holdich & Locking, Hull.*

Solicitors for the defendants: *Cunliffe, Blake & Mossman, for Middlemiss, Pearce & Miller, Hull.*

(1) L. R. 7 H. L. 207.

A. L.

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In re CONYNGHAM.

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[1920 C. 742.]

Will—Real Estate—Equitable Limitations—Strict Settlement—Revocation of first life Estate—First Estate tail not yet in esse—Interim acceleration of second life Estate.

By a will of 1915 the testator devised his Kent estates to the use of his trustees with absolute powers of management including power to raise money by mortgage for the payment of mortgage debts, and subject thereto upon trust out of the income to pay certain life annuities (some of which were still subsisting) and subject as aforesaid the testator devised the Kent estates to the uses of his Irish estates—namely, to the use of his brother the plaintiff for life with remainder to the use of the plaintiff's first and other sons successively according to seniority in tail male with remainder to the use of his nephew the infant defendant for life with divers remainders over in strict settlement and an ultimate remainder to the use of the testator's own right heirs.

By a codicil of 1916 the testator revoked the plaintiff's life estate in the Irish estates "and all other benefits" given him by the will and in lieu thereof he devised the Irish estates to the use of the trustees during the plaintiff's life upon trust to pay him a certain annuity out of income. In all other respects the testator confirmed his will.

In 1918 the testator died a bachelor leaving the plaintiff his heir at law. The plaintiff was married in 1914 but had no children:—

Held, that the testator had shown a clear intention to make the equitable limitations of the Kent estates completely exhaustive against his heir and consequently until the plaintiff had a son the infant defendant's life interest in the surplus rents was accelerated.

In re Willis [1917] 1 Ch. 365 (Equitable Limitations) followed.

Carrick v. *Errington* (1726) 2 P. Wms. 361; (1728) 5 Bro. P. C. 391 (Equitable Limitations); *Hopkins* v. *Hopkins* (1738) 1 Atk. 581 (Equitable Limitations) and *In re Scott* [1911] 2 Ch. 374 (Legal Limitations) explained and distinguished.

ORIGINATING SUMMONS.

By his will dated April 11, 1915, the testator, after appointing his mother and another person executors and trustees, devised his Irish estates to his trustees upon trust to permit his mother to use, occupy and enjoy Slane Castle Meath and the furniture therein during her life and to receive a sum not exceeding 3500*l.* a year for the upkeep thereof. And subject thereto and to certain life annuities thereby charged thereon

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To the use of his brother the plaintiff for life without impeachment of waste With remainder to the use of the plaintiff's first and other sons successively according to seniority in tail male With remainder to the use of his nephew, the infant defendant (a sister's son) for life without impeachment of waste With remainder to the use of that nephew's first and other sons successively according to seniority in tail male With divers remainders over in strict settlement and an ultimate remainder to the use of the testator's own right heirs.

The estates of tenants in tail male by purchase born in the testator's lifetime were, as usual, reduced to life estates with remainder to their sons in tail male.

The usual name and arms clause applicable to life tenants or tenants in tail male by purchase becoming entitled to possession or receipt of the rents provided that a life tenant refusing to take the name and arms should hold the rents and profits in trust for the persons who would be entitled if he were dead, and if the person so refusing were a tenant in tail male by purchase his estate should absolutely determine and the estates should devolve on the persons next in remainder as if he were dead without inheritable issue.

The testator devised his Kent estates including the furniture and fixtures at Bifrons to the use of his trustees upon trust to manage and cultivate the same with all the powers of absolute owners including powers to cut timber, make leases, accept surrenders, raise money by mortgage for the payment of mortgage debts, incumbrances, costs and expenses. And subject thereto upon trust out of the rents and income to pay certain life annuities to the testator's five sisters (some of whom were still living) any deficiency to be paid out of the Irish estates. And subject as aforesaid the testator devised the Kent estates to the uses of the Irish estates but not so as to increase or multiply charges or powers of charging.

The testator bequeathed his residuary personal estate to his trustees upon trust after payment of his funeral and testamentary expenses, debts and legacies to hold the same

upon the trusts which would be applicable thereto if the same had arisen from a sale under the Settled Land Acts of the estates devised in strict settlement and so as to be impressed with a trust for investment in freehold hereditaments and to devolve as real estate accordingly. And the testator appointed his trustees to be trustees for the purposes of the Settled Land Acts.

By a codicil dated November 18, 1916, the testator, after reciting that by his will he had devised his Irish estates to the use of the plaintiff for life without impeachment of waste, revoked the said devise "and all other benefits (if any) given to my said brother by my said will." And in lieu thereof the testator devised the said estates to the use of the trustees during the plaintiff's life upon trust out of the net rents and income to pay him a certain annuity. And in all other respects the testator confirmed his said will.

The testator died a bachelor on November 8, 1918. The plaintiff was his heir at law. The plaintiff was married on November 28, 1914, but had no children. The infant defendant, the life tenant in remainder, was eight years old.

The question arose whether on the true construction of the will and codicil and in the events that had happened the surplus rents and profits of the Kent estates pending the birth of a son to the plaintiff went to the plaintiff as heir at law or whether pending that event the infant's life estate in remainder was accelerated.

On March 10, 1920, the plaintiff issued this summons to determine the point, all questions as to the Irish estates being left to the Irish Courts.

Maugham K.C., *Hildyard K.C.* and *McMullan* for the plaintiff. The will created an equitable life estate in the plaintiff with a contingent remainder to his unborn sons in tail male with a vested remainder to the infant defendant for life. The revocation of the plaintiff's life estate turns the contingent and vested remainder into executory devises, but it does not accelerate the infant defendant's estate, and the intermediate rents for the time being undisposed of belong

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to the plaintiff as heir at law: Jarman on Wills, 6th ed., p. 718; *Carrick* v. *Errington* (1); *Hopkins* v. *Hopkins* (2), both cases of equitable estates.

The heir can only be deprived of these rents by an express or necessarily implied gift to somebody else: *Tregonwell* v. *Sydenham* (3); *Bective* v. *Hodgson.* (4)

In *In re Scott* (5) Warrington J. applied *Carrick* v. *Errington* (1) to legal limitation of legal estates, the first of which had been disclaimed. If the estates had been equitable, there would have been no difficulty as he would have felt himself bound by the House of Lords' decision in that case.

In *In re Willis* (6), however, Younger J. considered that *Carrick* v. *Errington* (1) laid down no general rule as to equitable estates. He distinguished *In re Scott* (5) on the ground that it related to legal estates in which there might be technical difficulties in giving effect to the testator's intention. He thought that the common-form ultimate limitation to the testator's own right heirs following a series of prior limitations in strict settlement showed an intention to make those prior limitations effectually exhaustive against the heir, and he accelerated the remainders accordingly.

But that argument would equally have applied in *Carrick* v. *Errington* (1) and *Hopkins* v. *Hopkins* (7) where, notwithstanding similar ultimate limitations, the intermediate rents went to the heir.

Suppose however that the testator's intention is the one determining factor. He was a bachelor settling his family estates in strict settlement. He knew his brother was his heir and gave estates in tail male to his sons. He obviously expected them to take as he cut down the estates of those born in his lifetime to life estates. Then he gave a life estate in remainder to the infant defendant, a sister's son, and so on. Is it conceivable that he intended the infant's estate to begin

(1) 2 P. Wms. 361; 5 Bro. P. C. 391.
(2) 1 Atk. 581, 582, 597.
(3) (1815) 3 Dow. 194.
(4) (1864) 10 H. L. C. 656.
(5) [1911] 2 Ch. 374.
(6) [1917] 1 Ch. 365.
(7) 1 Atk. 581.

at all while there was a chance of the main line taking? Or rather is that intention so strongly manifested that the Court must necessarily imply a gift of these intermediate rents to that infant for life, with all a life tenant's powers exercisable until the plaintiff has a son? On the death of that son without leaving male issue or brothers the rents would presumably shift back to the infant defendant until another son was born to the plaintiff and so on. The testator cannot have intended complicated shifting limitations of this nature, and unless the Court can hold that they are necessarily implied, the intermediate rents are undisposed of and belong to the plaintiff until his son is born.

These views are in accordance with *In re Townsend's Estate* (1), *In re Vernon* (2) and *In re Cooper* (3), a decision of Younger J. shortly after *In re Willis.* (4)

Micklem K.C. and *L. W. Byrne* for the infant defendant. The limitations being equitable, the question depends entirely on the testator's intention. He clearly intended to make an exhaustive disposition of his property away from his heirs, except under the ultimate trust, and the name and arms clause shows that shifting uses were in his contemplation. The plaintiff's interest as life tenant and as heir under the ultimate trust is revoked by the codicil.

The will and codicil read together create an exhaustive series of executory limitations, under which the infant defendant takes an immediate vested life estate in possession subject to a valid executory devise or springing use to the plaintiff's son when born: *White* v. *Summers* (5) where, however, the prior estate being a contingent remainder, altogether failed under the old law.

In *Carrick* v. *Errington* (6) the estate to preserve contingent remainders was accelerated and as the trustees could not hold for themselves or the papist life tenant they held for the settlor's heir. But neither in that case nor in *Hopkins* v.

(1) (1886) 34 Ch. D. 357.
(2) (1906) 95 L. T. 48, 54.
(3) [1917] W. N. 145; 86 L. J. (Ch.) 507.
(4) [1917] 1 Ch. 365.
(5) [1908] 2 Ch. 256, 273.
(6) 2 P. Wms. 361; 5 Bro. P. C. 391.

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Hopkins (1) was there any argument based on the settlor's or testator's intention to make an exhaustive disposition of his property.

The present case follows a fortiori from *In re Willis* (2) which was in no way dissented from in *In re Cooper.* (3) In *In re Willis* (2) the life estate was created, but disclaimed. Here it was never created.

In re Scott (4) turned on the mistaken view that the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), created an estate to preserve contingent remainders. The case is elaborately discussed in 32 L. Q. R., pp. 83, 392; 33 ibid., pp. 132, 254.

The Courts are generally in favour of acceleration in these cases—*Lainson* v. *Lainson* (5); *D'Eyncourt* v. *Gregory* (6); *Turton* v. *Lambarde* (7); *Jull* v. *Jacobs* (8)—though of course they cannot accelerate a wholly unascertained contingent class: *In re Townsend's Estate.* (9)

Luxmoore K.C., *Dighton Pollock* and *Droop* for the trustees.

Maugham K.C. in reply. In *Lainson* v. *Lainson* (5) and *Jull* v. *Jacobs* (8) there were no contingent intermediate estates. In *D'Eyncourt* v. *Gregory* (6) the trusts were wholly executory and in *Turton* v. *Lambarde* (10) there were powers of maintaining infant remaindermen during the life tenancies.

ASTBURY J. (after stating the facts). The plaintiff as heir at law submits that there is an intestacy as regards the surplus rents and profits of the Kent estates until he has a son. The infant defendant maintains that his own interest is accelerated and that he is entitled to those rents and profits until either his own estate becomes indefeasible, or until the plaintiff has a son.

There are many authorities on the point. The general rule as to acceleration in the case of realty is stated in Jarman

(1) 1 Atk. 581.
(2) [1917] 1 Ch. 365.
(3) [1917] W. N. 145; 86 L. J. (Ch.) 507.
(4) [1911] 2 Ch. 374.
(5) (1854) 18 Beav. 1; 5 D. M. & G. 754.
(6) 34 Beav. 36, 48.
(7) (1860) 1 D. F. & J. 495, 516.
(8) (1876) 3 Ch. D. 703.
(9) (1886) 34 Ch. D. 357.
(10) 1 D. F. & J. 495, 517.

on Wills, 6th ed., pp. 718, 719. After showing that the authorities are clearly in favour of acceleration as a general rule, the author says : " Where, however, the particular estate which fails is followed by a contingent interest, and that by a vested interest, the ultimate interest will not be accelerated by the failure of the particular estate, but there will be an intestacy until it is ascertained whether the contingent interest will take effect or not."

The plaintiff contends that this passage correctly states the law applicable to the present case. It is based on *Carrick* v. *Errington* (1), decided in the first instance by King L.C. and subsequently approved by himself in the House of Lords with the assistance of the Lords Spiritual and Temporal. (2) In that case Edward Errington, seised in equitable fee of lands in Northumberland, by lease and release in 1714, settled the same to the use of himself for life with remainder to his first and other sons in tail male successively with remainder to Thomas Errington, a papist, for life with remainder to trustees and their heirs during Thomas's life to preserve contingent remainders with remainder to Thomas's first and other sons in tail male successively with remainder to William Errington, a protestant, for life, with remainder to trustees and their heirs during William's life to preserve contingent remainders with remainder to William's first and other sons successively in tail male with an ultimate remainder to the settlor's own right heirs. The settlor died without issue. The question arose as to what should become of the profits during Thomas the papist's life, i.e., whether they should go to the grantor's heir, or to the next remainderman in existence. It was held that if the estate should go to the subsequent remainderman, William the protestant, it could not afterwards go back to any protestant son of Thomas; and that this being a hardship and wrong to a third person, the rents and profits during Thomas the papist's life ought to go to the grantor's heir. It was objected that since there was a trust in the trustees during Thomas the papist's life and the trust was a creature of equity, the Court which had

(1) 2 P. Wms. 361, 364; 5 Bro. P. C. 391. (2) 23 H. L. J. 273.

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the power of direction thereof ought to let William, the next remainderman, into possession, and that in case Thomas should have protestant sons the Court would then order the trust and secure the profits for their benefit. King L.C. said: "This would be making use of an extraordinary power of diverting and displacing estates, which he would not take upon himself to do; and that the intent and meaning of the statute" (1)—as to papists—"was in a more plain and easy manner complied with, by construing the estates and trusts to be void, as to the papist only, but not to let the next protestant remainderman into possession before his time, so as to prejudice or endanger a third person, the son or sons of Thomas Errington the papist." It was therefore held that the interest during Thomas the papist's life was undisposed of. The decision was affirmed in the House of Lords.

That was in form a strict settlement to legal uses created by deed, though the legal estate was in fact outstanding. The trustees' estates were limited to the one and only duty of preserving contingent remainders, and no question of an equitable interest given to William according to the settlor's true intent and meaning to the exclusion of the heir was, according to the judgment, open or arguable.

In *Hopkins* v. *Hopkins* (2), the next case the plaintiff relied on, the testator disposed of his real and personal estate by will. He devised the real estate to the use of trustees and their heirs upon trust for Samuel, the only son of the testator's cousin John, for life, and after Samuel's decease in trust for his sons successively in tail male and for want of such issue, in case John should have any other son or sons, then successively for every such son for life with remainder to his sons successively in tail male, and in default of certain intermediate limitations operating, in trust for the sons of his cousin Hannah Dare successively for life with respective remainders to their sons successively in tail male with remainders over and an ultimate remainder to the testator's own right heirs. Samuel predeceased the testator without

(1) 11 & 12 Will. 3, c. 4: "An Act for further preventing the growth of popery."

(2) 1 Atk. 581, 588.

issue and after the testator's death, John his heir sought to have the profits of the realty handed over to him as undisposed of until some person capable of taking under the will should come into esse. Jekyll M.R. and Talbot L.C. decreed that the trustees should deliver possession to the heir until some one should become entitled to an estate for life in possession under the executory devises. At a subsequent date a further suit was commenced, John having had another son William born after the first suit and since dead so that the first executory devise temporarily became a life estate in possession. On William's death Hannah Dare's eldest son brought a bill to have the estate handed over to him, on the ground that the prior limitations had become contingent remainders on William's birth and therefore failed on his death. Lord Hardwicke said: "For the plaintiff it is argued, that the estate vested in William on his birth, and was no longer executory, and consequently all the subsequent limitations became remainders, either contingent, or vested, according to their respective natures, and that those that were contingent, not vesting, either during, or eo instante, that the particular estate of William determined, are now void, and consequently the plaintiff, as having the first remainder vested in him, is entitled to the estate in possession. . . . . I am of opinion, that the legal estate in the trustees will support (at least) some of these contingent remainders, for it is not to be contended that all of them are good, and this on two grounds. First, upon the plain intention of the testator. Secondly, that this intention is consistent with the rules of law, and the common principles of equity. First, as to the intention, the present plaintiff certainly comes before the Court in a very unfavourable light, for he claims under the will, and the testator's bounty, and at the same time endeavours to defeat the greatest part of it; indeed this was retorted on the defendant the heir-at-law, but that is very different, for he does not claim by the will, or the testator's intention, but paramount to that, and only asks that which is not given from him." For these reasons it was held that the remainderman's estate was not accelerated.

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In Hawkins on Wills, 2nd ed., p. 61, the learned author says: "It appears on investigation that the important case of *Hopkins* v. *Hopkins* (1) decided that neither a specific nor a residuary devise of real estate to the use of an unborn person, or to the use of trustees in trust for an unborn person, carries the rents and profits accruing during the suspense of vesting, but that such intermediate rents descend to the heir-at-law."

In *Hopkins* v. *Hopkins* (1) the plaintiff in the second suit contended that he took to the final exclusion of all the equitable estates limited in front of him to unborn persons, notwithstanding the devise in trust to the trustees. In that case the earlier interests that failed came to an end without any volition or intention on the part of the testator, who, apart from his dispositions as above, expressed no intentions relevant to the question in dispute. No argument was addressed to Lord Hardwicke based on any intention of the testator to make an exhaustive disposition; and except in his reference (2) to *Carrick* v. *Errington* (3) as to the ambit of estates to preserve contingent remainders, no question of any intention on the part of the testator governing the matter was referred to.

In *Tregonwell* v. *Sydenham* (4) Lord Eldon approved the decision in *Carrick* v. *Errington* (3) and said in substance: "Wherever land, or any interest in land, which would descend to the heir-at-law, is devised for purposes which the law will not permit to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether the testator intended that he should have it or not; for there is this distinction between the case of a devisee and that of an heir-at-law, that the devisee takes by force of the intent of the testator and can only take what is given him by the will; whereas the heir-at-law takes whatever is undisposed of, not by force of the intent, but by the rule of law."

In *Bective* v. *Hodgson* (5) Lord Westbury said: "It is an

(1) 1 Atk. 581, 588.
(2) 1 Atk. 597.
(3) 2 P. Wms. 361; 5 Bro. P. C. 391.
(4) 3 Dow. 194, 209, 212.
(5) 10 H. L. C. 656, 664, 666.

indisputable rule of law, that if a freehold estate be given by way of executory devise, there is no disposition of the property until that estate arises and becomes vested; and, consequently, in the meantime the freehold property descends to the heir-at-law." He referred with approval to *Hopkins* v. *Hopkins* (1) and said: "It was held, and very rightly held, that during the period of time in which the estate is in suspense between the death of the testator and the arising of the executory use, the rents and profits of necessity descended to the heir."

Of course, if and while the estate is in suspense, this result necessarily occurs, as a testator can only deprive his heir of his real estate by giving it to some one else. The question in the present case is whether the testator, knowing all the relevant facts, has by his will and codicil, rightly construed, done so, expressly or by necessary implication.

There are two recent cases in which these decisions have been discussed. The plaintiff relies on one, the infant defendant on the other. The first is *In re Scott.* (2) In that case a testator legally seised of freehold estates devised them to the use of his eldest son John for life, with remainder to the use of John's first and other sons successively in tail male, with remainder to the use of his grandson Walter, the son of Joseph, for life, with remainders over. The will contained a residuary bequest. John, who though married had no issue, disclaimed his life estate. Warrington J. held, following *Carrick* v. *Errington* (3), that Walter's life estate in remainder was not accelerated, but that the rents and profits until John had a son fell into residue. In that case John did not appear or contend that he took the interim rents and profits as heir at law. Warrington J., after referring to *Carrick* v. *Errington* (3), says (4): "I think, therefore, to take it by steps, if there had been introduced here trustees to preserve contingent remainders . . . . the estate of Walter Scott would not have been accelerated. Now, since the Act of 1877 a

(1) 1 Atk. 581.
(2) [1911] 2 Ch. 374.
(3) 2 P. Wms. 361; 5 Bro. P. C. 391.
(4) [1911] 2 Ch. 380.

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contingent remainder, if it is otherwise valid, ... is not liable to destruction, but may take effect as an executory limitation. What then is the effect of that? . . . . The effect is to put the present limitation on the same footing as if there had been trustees to preserve contingent remainders. It is true that the limitation in remainder to the use of Walter Scott is a vested remainder, ... but nevertheless there is interposed an estate tail in the sons of John, and according to the old rules relating to limitations of real estate it seems to me impossible that there could be an estate in remainder which might afterwards come to an end so as to let in an estate previously limited. That is so stated in *Carrick* v. *Errington*. (1) . . . . I cannot accelerate the gift in remainder without destroying the estate tail to the possible issue of John." In other words he applied *Carrick* v. *Errington* (1) to legal limitations of legal estates on the ground (inter alia) that since the Contingent Remainders Act the case ought to be regarded as if those limitations had in fact included the old strict settlement trust to preserve contingent remainders.

In *Carrick* v. *Errington* (1) the particular estate failed by reason of a statutory provision. In *Hopkins* v. *Hopkins* (2) it failed by reason of the devisee predeceasing the testator. In *In re Scott* (3) it failed by reason of the devisee disclaiming. In the last case no argument was perhaps available that by reason of the testator's intention appearing from his dispositions, taken as a whole, the intermediate rents and profits were in fact given by him to Walter Scott, and excluded from the residuary gift. Warrington J. felt himself bound by *Carrick* v. *Errington*. (1) He did not purport to do more than follow and apply it to legal limitations, and no question of the testator's intention with regard to them arose.

In *In re Willis* (4), which is relied upon by the infant defendant, the particular estate failed also by reason of the devisee disclaiming. The facts were these: The testator,

(1) 2 P. Wms. 361; 5 Bro. P. C. 391.
(2) 1 Atk. 581.
(3) [1911] 2 Ch. 374.
(4) [1917] 1 Ch. 365.

who died in 1899, devised real estate unto and to the use of trustees in fee simple upon trust for James (his heir at law) for life, with remainder in trust for James' sfirst and other sons successively in tail, and in default of such issue in trust for each successively of William and David for life, with remainder immediately after the death of each of them in trust for his first and other sons successively in tail, with an ultimate trust for testator's own right heirs. James disclaimed the devises and bequests made in his favour except under the ultimate trust. He was still living but had no son. William (to whom the income had been paid during his life by way of family arrangement) was now dead without issue. David was living and claimed to take. Younger J. held that the effect of James's disclaimer was to accelerate the equitable remainders until a son of James was born, and that until that event the income was payable to David during the joint lives of himself and James.

The facts of *In re Willis* (1) are indistinguishable from those in the present case, with this exception: In *In re Willis* (1) the particular estate failed owing to the devisee's disclaimer; whereas in the present case it was revoked by the testator and never came into being. In *In re Willis* (1) as distinct from *In re Scott* (2), the estates were, as they are in the present case, equitable and not legal estates. Younger J. considered and discussed *Carrick* v. *Errington* (3), *Hopkins* v. *Hopkins* (4), *In re Scott* (2), and the other authorities. He came to the conclusion that, on the provisions of the will before him, the testator had sufficiently shown an intention to give the interests under his equitable limitations in immediate succession, and to make an exhaustive disposition of his property, and that there was therefore no room to apply the doctrine or principle of *Carrick* v. *Errington* (3) and *Hopkins* v. *Hopkins* (4), and that *In re Scott* (2) was distinguishable. He says (5): "But between *In re Scott* (2) and this case there is one all-important distinction: the

(1) [1917] 1 Ch. 365.
(2) [1911] 2 Ch. 374.
(3) 2 P. Wms. 361; 5 Bro. P. C. 391.
(4) 1 Atk. 581.
(5) [1917] 1 Ch. 373.

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limitations there were legal; there was not there, as there is here, an outstanding legal estate in trustees with equitable limitations only declared. In reference to such limitations, a technical objection . . . . which may be fatal where the limitations are legal has not . . . . necessarily any force. A trust . . . . to pay the income of trust property to A. during the life of B. until B. has a son, and then to pay the income to or to hold the property . . . . for that son, is a trust to which . . . . no technical objection can be taken. Nor can I see any reason why in this very case such a trust should not be implied, if the intent . . . . is . . . . clear, and an intestacy as to the income is the only alternative. For in determining the effect of these limitations, equitable as they are, it is the intent . . . . which must prevail. Had they been legal limitations different principles, as appears from *In re Scott* (1), might have been applicable." He then distinguishes *Carrick* v. *Errington* (2) and says (3): "It appears . . . . impossible to hold that it has laid down any general rule applicable to the construction of equitable limitations and fixing the destination of intermediate rents and profits where a prior interest having been destroyed there is interposed between it and the next vested interest a contingent interest which has not and which never may come into existence. A fortiori . . . . it can be no authority for determining the destination of these rents and profits in the case of a series of equitable limitations amongst which no estate to preserve contingent remainders with express trusts in relation to it is interposed. Further, the limitations in *Carrick* v. *Errington* (2) were contained in a . . . . lease and release, and its application to the construction of . . . . a will must at least be qualified." He then held that the provisions of the will before him were not rendered incapable of taking effect by the disclaimer of the particular estate, and that David's interest in remainder was accelerated.

That is the last case upon the subject. In it substantially all the authorities relied upon by the plaintiff in the present

(1) [1911] 2 Ch. 374.
(2) 2 P. Wms. 361; 5 Bro. P. C. 391.
(3) [1917] 1 Ch. 376.

case are considered, discussed, and distinguished, and I think it is my duty, quite irrespective of any opinions of my own, to follow it.

I must, however, point this out. Younger J. held that by making the successive limitations in his will the testator had shown a sufficient intention to dispose exhaustively of his estate, so that each successive interest ready to come into possession should come into enjoyment.

In the present case, the matter is a fortiori. Here the particular estate has not come to an end by an event occurring after the testator's death. It was rendered inoperative ab initio, the testator himself having decided that it should never be created. [His Lordship read the codicil.] It is abundantly plain that the testator expressly devises to his trustees the life interest in the Irish estates which the plaintiff would otherwise have taken under the will. At the same time, he revokes all other benefits given to him by the will.

If Younger J. was justified in holding that the will before him sufficiently showed the testator's intention that the successive interests were to come into operation immediately, one after the other, without interregnum, a fortiori this testator has shown a similar intention. If *In re Willis* (1) was right, it would be extravagant to hold that there is an intestacy of the intermediate rents and profits in the present case. No reported case on acceleration apparently deals with the effect of revoking a particular equitable estate, and it is much easier in these circumstances to presume intention than in those existing in *In re Willis*. (1) (See *Lainson* v. *Lainson*. (2))

The plaintiff argued with much force, that the real point against the infant defendant is that the Court will not construct an elaborate system of shifting and possibly destructive uses which the testator never dreamed of. If this had been a case of strict legal limitations and *In re Willis* (1) were held to apply, the estate might shift backwards and forwards between the infant defendant and the plaintiff's possible son or sons

(1) [1917] 1 Ch. 365. (2) 18 Beav. 1; 5 D. M. & G. 754.

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born and dying from time to time, unless *Carrick* v. *Errington* (1) and *Hopkins* v. *Hopkins* (2) would, even at the present day, notwithstanding the testator's intention to the contrary, eliminate altogether the possible interests under the intermediate limitations. But, in the present case, no such difficulty arises. The whole Kent estates are vested in trustees upon certain trusts. In carrying out those trusts they and they only can collect and receive the rents and profits during the life of the plaintiff and his sister annuitants. They plainly cannot hold the rents for themselves, and the testator clearly did not intend them to be held for the plaintiff whose benefits he revoked. It follows a fortiori from *In re Willis* (3) that they must be held for the person next entitled in possession under the trusts declared by the will and codicil.

I propose only to say a word about the other authorities cited. A future devise of an estate does not carry the intermediate rents and profits, and unless the testator has dealt with the intermediate income expressly or by necessary implication, the Court cannot imply a gift. In *In re Townsend's Estate* (4), Chitty J. applied this rule to a blended fund where it was impossible to ascertain the ultimate contingent beneficiaries until the intermediate period had terminated. In *In re Cooper* (5) Younger J., shortly after his decision in *In re Willis* (3), came to a similar conclusion, following an earlier decision of North J. in the same case. *Lainson* v. *Lainson* (6), *D'Eyncourt* v. *Gregory* (7), and *Turton* v. *Lambarde* (8) show how anxious the Courts are, if possible, to give effect to the testator's intention appearing in his will, apart from the strict interpretation of his actual words.

In the present case, for the reasons that I have given I follow *In re Willis* (3) and hold that the testator has on the true construction of his will and codicil made an effective

(1) 2 P. Wms. 361; 5 Bro. P. C. 391.
(2) 1 Atk. 581.
(3) [1917] 1 Ch. 365.
(4) 34 Ch. D. 357.
(5) [1917] W. N. 145; 86 L. J. (Ch.) 507.
(6) 18 Beav. 1; 5 D. M. & G. 754.
(7) 34 Beav. 36, 48.
(8) 1 D. F. & J. 495, 516.

disposition of the surplus rents and profits in question to the exclusion of his heir at law. There will therefore be a declaration that until the plaintiff has a son the infant defendant is entitled to the surplus rents and profits of the Kent estates in the hands of the trustees.

Solicitors: *Gustavus Thompson & Sons; Rawle, Johnstone and Co., for Finch, Johnson & Co., Preston; Saltwell & Co.*

G. R. A.

In re HINCKES.

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[1920. H. 670.]

Will—Shifting Clause—Construction—"Actually entitled to the possession or the receipt of the rents of" the family Estate "or the bulk of that estate"—Event—Rentcharge exhausting Bulk of Rents—Lessee of Mansion House—Power to Jointure and Portion—Absolute Power of Appointment.

In 1900 G. was life tenant of a family estate. His son R. was second life tenant of the greater part, and remainderman in fee of the rest. G. and R. had a joint power of appointment over the whole estate.

R. was also life tenant of the H. estate, but under a shifting clause in the will devising it, he would lose it if he became actually entitled to the possession or the receipt of the rents of the family estate or the bulk of it.

In order to defeat this shifting clause and enable R. virtually to have the full benefit of both estates a conveyancing device was resorted to, whereby the family estate was appointed so that at G.'s death in 1919 the interests were as follows:—

1. R. was given a life rentcharge of 3700*l.* charged on the family estate but abateable in any year if it exceeded nine-tenths of the net rents now about 2000*l.*

2. Subject thereto the estate was limited to the trustees during R.'s life with possession and full powers of management.

3. The surplus income after paying the rentcharge and expenses was applicable for R.'s wife and children at the trustees' discretion.

4. The trustees were given the full powers of a life tenant under the Settled Land Acts.

5. R. was entitled to a lease of the mansion house, park and sporting rights at a nominal rent.

6. R. was given full powers of jointuring, portioning and appointing new trustees.

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7. R. was given a power to revoke and appoint new uses:—
Held, that the above device was effectual, and that R. though financially and otherwise in as good a position as if he were life tenant in possession of the family estate was not either at law or in equity entitled to the possession or the receipt of the rents of the bulk of that estate, and consequently the shifting clause did not operate.

ORIGINATING SUMMONS.

By the Foxley settlement of July 19, 1865, made in pursuance of directions in the will of John Davenport who died on April 18, 1862, the Foxley estate was settled to the use of the testator's eldest son George a bachelor for life, with remainder to the use of George's sons successively according to seniority in tail male with a like remainder to the use of his sons in tail general with remainder to the use of the testator's second son Harry a bachelor for life, with similar remainders to the use of Harry's sons in tail male and tail general as in the case of George with remainder to the use of George's daughters successively according to seniority in tail with a similar remainder to Harry's daughters with an ultimate remainder to the survivor of George and Harry and his heirs.

By her will dated October 23, 1872, Theodosia Hinckes devised the Hinckes estate to the use of Harry for life with remainder in the events that happened to the use of George's only son Ralph for life with remainder to the use of Ralph's sons successively according to seniority in tail male with remainder to the use of Ralph's sons successively according to seniority in tail general with remainders in favour of the sons and grandsons of Harry (who died without issue) with numerous remainders over including (inter alia) limitations in favour of George's and Harry's female descendants with an ultimate remainder to George and his heirs.

The will contained a shifting clause which provided that if any child or remoter issue of George or Harry "within the scope of the limitations hereinbefore contained shall by any means whatsoever become actually entitled to the possession or the receipt of the rents and profits of the Foxley estate" devised by the will of their father John Davenport and thereby directed to be settled "or the bulk of the same

estate whether consisting of the same particulars as that estate now consists of or in manner altered in the way of addition substitution diminution or otherwise and so that this proviso shall not be rendered inoperative by reason of such estate or any part or parts thereof being subjected to any charges or incumbrances whatsoever then and so often as the same shall happen and thereupon every estate hereinbefore limited for life and in tail male and in tail to the child of " George or Harry " who or any of whose issue shall so become entitled and as to any child to whom an estate for life is hereinbefore limited to the first and other sons or daughters respectively of such child shall absolutely determine and the said premises hereinbefore devised shall go and remain discharged from all charges created by any such person as tenant of such estate for life under any of the powers of charging herein contained to the uses . . . . to which the same premises would have stood limited . . . . by . . . . my will if such child had died and there had been a general failure of his or her issue and if a male without leaving a widow."

The will contained a name and arms clause requiring life tenants and tenants in tail male or in tail on becoming entitled to the actual possession or the receipt of the rents and profits of the Hinckes estate, to take the name and arms of Hinckes. This had hitherto been complied with.

The testatrix died on May 4, 1874, at which time George, who was married on February 6, 1866, was life tenant of the Foxley estate, and Ralph, born on January 28, 1873, was tenant in tail male subject to a jointure of 600*l.* to George's wife Sophia who in fact predeceased him. On the other hand Harry and Ralph became the first and second life tenants of the Hinckes Estate.

By the Foxley disentailing deed of December 13, 1894, George and Ralph disentailed the Foxley Estate and limited it subject to Sophia's 600*l.* jointure to such uses as they should jointly appoint and in default of appointment to the use of George for life with remainder (subject to a further 300*l.* jointure to Sophia) to Ralph and his heirs.

On March 19, 1895, Harry, then a widower, died without

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issue, and Ralph, still a bachelor, became life tenant in possession of the Hinckes estate.

By the Foxley resettlement of April 4, 1896, George and Ralph appointed the greater part of the Foxley estate (hereinafter called the settled portion) subject to Sophia's 900*l.* jointure to such uses as they should appoint and in default of appointment to the use of George for life in restoration of his former life estate with remainder to the use of Ralph for life with remainder to the use of Ralph's children as he should appoint and in default of appointment to the use of his sons successively according to seniority in tail male with remainders over.

As there was a considerable risk that Ralph might succeed to the Foxley estate and forfeit the now far more valuable Hinckes estate under the shifting clause the following appointment was executed to avoid this risk.

By the Foxley appointment of May 3, 1900 (1) George and Ralph appointed the settled and unsettled portions of the Foxley estate subject to Sophia's 900*l.* jointure and subject to and preserving the joint powers in the resettlement and disentailing deed as to the settled and unsettled portions respectively. To the use that if Ralph survived George he should receive the yearly rent charge of 2800*l.* during the residue of his life and after his mother Sophia's death then the further yearly rentcharge of 900*l.* during the residue of his life the said rentcharges to be charged upon the whole Foxley estate, the 2800*l.* rentcharge to commence from George's death and the 900*l.* rentcharge from the death of the survivor of George and Sophia: Provided always that the said rentcharges should not in any year exceed nine tenth parts of the net rents and profits of the Foxley estate in that year after payment of all annual sums (other than those rentcharges) and the interest on all principal sums (if any) charged on the Foxley estate and all management expenses and all other outgoings, and those rentcharges should, if necessary, from time to time abate so as to give effect to this provision And subject to those rentcharges it was declared that after George's

(1) This was settled by the late E. P. Wolstenholme and Henry Casson. —G. R. A.

death and subject as aforesaid the whole Foxley estate should thenceforth go to the use of the trustees during the residue of Ralph's life Upon trust that they should enter into and continue in the possession or receipt of the rents and profits of the whole Foxley estate during the remainder of Ralph's life and manage that estate with all the powers in that behalf conferred on trustees during a minority by s. 42, sub-s. 2, of the Conveyancing Act, 1881 And also with powers to insure buildings, subscribe to local charities connected with the estate, expend money in planting woods, and orchards, and making repairs alterations and improvements to the mansion house, etc. And it was declared that the trustees should out of the income of the Foxley estate including the produce of the sale of timber and underwood pay the management expenses and all outgoings and keep down all annual sums including the said rentcharges and the interest on all principal sums (if any) charged on the said estate and subject thereto should pay or apply the surplus income for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the others of Ralph's wife and issue for the time being in existence as the trustees should in their absolute discretion think proper or if there should for the time being be no object or only one object of such discretionary trust in existence then should pay or apply the surplus income for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the others of such one object (if any) and the person or persons who would under the limitations thereinafter contained be entitled to receive the said income if Ralph had died immediately after George and without ever having been married as the trustees should in their absolute discretion think proper and it was declared that during the continuance of the estate thereinbefore limited to the trustees during Ralph's life the trustees should have all the powers of selling leasing and other powers conferred on a life tenant by the Settled Land Acts, 1882 to 1890, and might exercise all those powers without the consent of any other person And further that the trustees should if Ralph so required demise to him for a term of 99 years

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if he should so long live the mansion house and the park and grounds occupied therewith at a yearly rent of 300*l.* to be set off against a corresponding amount of the rentcharges for the time being payable to him, the demise to include such sporting rights over the residue of the Foxley estate as Ralph might require and to contain such covenants for payment of rents rates taxes insurance and repair as the trustees might think necessary And subject thereto it was declared that the settled portion of the Foxley estate should remain To the use that Ralph during his life should have the like powers of jointuring and charging portions as were given to him by the resettlement and were thereby annexed to his life estate therein limited in like manner as if that life estate had not been over-reached and extinguished by this appointment but so nevertheless that the said powers of jointuring and charging portions might be over-reached by the trustees' exercise of their Settled Land Act powers and subject as aforesaid To the uses of the resettlement limited and to take effect after Ralph's death And the unsettled portion of the Foxley estate should remain to the use of Ralph's right heirs And it was declared that Ralph should have power to appoint new trustees. Provided always that it should be lawful for Ralph at any time by deed to revoke the uses thereinbefore limited and declared but as regards the settled portion of the Foxley estate only so far as the same did not extend beyond his original life estate under the resettlement and to declare any new uses but as regards the settled portion of the Foxley estate not exceeding in extent his original life estate and that subject thereto the Foxley estate should go and devolve in like manner in all respects as if this appointment had never been executed.

On December 7, 1909, Ralph was married and subsequently had a son and daughter born in 1910 and 1912 respectively.

On October 16, 1919, George died, and as his wife Sophia had predeceased him, Ralph became entitled to both the rentcharges of 2800*l.* and 900*l.* on the Foxley estate. He had applied for a lease of the Foxley mansion house and the trustees were willing to grant it.

Some of the remaindermen of the Hinckes estate contended that the shifting clause had taken effect.

On March 3, 1920, one of the trustees issued this summons to determine the point. The other trustee was one of the remaindermen defendants.

The Hinckes estate now produced about 4000*l.* a year net and the Foxley estate about 2000*l.* net.

P. M. Walters for the trustee.

Romer K.C. and *Northcote* for Ralph and his children. Ralph is entitled to a 3700*l.* rentcharge on the Foxley estate, abateable if it exceeds nine-tenths of the net rents. But he is not entitled to possession or receipt of one penny of those rents. If the net rents rose to 5000*l.* he would only get 3700*l.* and no more. The balance would be applied for the benefit of his wife and children under the discretionary trust. During Ralph's life the trustees are in possession of the Foxley estate and the rents. Ralph is only an incumbrancer, not a cestui que trust. The shifting clause provides for many events to avoid previous decisions (1), but it does not provide for this event, and being a divesting clause it must be limited to the events specified : *Shuttleworth* v. *Murray* (2) ; *Fazakerly* v. *Ford* (3) ; *Leslie* v. *Earl of Rothes.* (4)

Upjohn K.C. and *Ashworth James* for the remaindermen claiming under the shifting clause. The Court must look at the substance of the shifting clause and not adhere to its exact form. In form it would apply if Ralph became entitled to Foxley as trustee for an infant. But that is absurd. The substance must be regarded and the general intention must be gathered from the will and the surrounding circumstances : *Harrison* v. *Round* (5) ; *Lady Langdale* v. *Briggs* (6) ; *Fazakerly* v. *Ford* (7) ; *Shuttleworth* v. *Murray* (8) ; *Leslie* v. *Earl of Rothes.* (9)

(1) See 3 Davidson's Precedents, 3rd ed., Part I., pp. 349–402.
(2) [1901] 1 Ch. 819 ; [1902] A. C. 263.
(3) (1831) 4 Sim. 390 ; (1832) 1 Ad. & E. 897.
(4) [1894] 2 Ch. 499.
(5) (1852) 2 D. M. & G. 190, 201.
(6) (1856) 8 D. M. & G. 391, 429.
(7) 4 Sim. 390, 415 ; 1 Ad. & E. 897.
(8) [1901] 1 Ch. 819, 833.
(9) [1894] 2 Ch. 499, 512, 514.

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Now it is clear that the testatrix meant the Hinckes and Foxley estates to descend in different lines. At the date of her will George was life tenant of the family estate, Foxley, but he had no issue. The testatrix therefore made his younger brother Harry life tenant of Hinckes, but limited the first remainder to George's sons, trusting to the shifting clause to keep Foxley and Hinckes in different lines.

The 1900 appointment was a highly ingenious conveyancing device to defeat that intention. In form it is obviously successful. But the Court must consider the substance and not the mere phrasing of dexterous draftsmen: *Adam* v. *Newbigging*. (1)

In form Ralph is entitled neither to the estate nor the rents. But that is only conveyancing camouflage. In substance he is at present entitled to nine-tenths, i.e., the bulk of the net rents, now about 2000*l*. and will continue so entitled unless and until they are more than doubled so as to exceed 4111*l*. when he will get his full 3700*l*. and no more. But the balance now and in future will go to his wife and children—i.e., really for his benefit. He is entitled to a lease of the mansion house and park at a nominal rent, of which he really gets back nine-tenths and has full powers of jointuring portioning and appointing new trustees. The trustees are in substance in possession as his agents; his power of revocation and new appointment gives him complete control of the property: *Garrard* v. *Lord Lauderdale* (2); and in substance he is now squire of Foxley.

The rentcharge is only charged on the rents, not the corpus.

Romer K.C. in reply. The power of appointment does not entitle Ralph to possession or receipt of the rents unless he so appoints: *Bower* v. *Smith*. (3) He is no doubt in as good a financial position as if he were so entitled, but that is not the point. A shifting clause, unlike a clause excluding an eldest son from a portion, must be construed strictly: *Collingwood* v. *Stanhope* (4); and the Court cannot import

(1) (1888) 13 App. Cas. 308, 315.
(2) (1830) 3 Sim. 1, 12; (1831) 2 Russ. & My. 450, 455.
(3) (1871) L. R. 11 Eq. 279.
(4) (1869) L. R. 4 H. L. 43, 52, 57.

words that are not there on a speculation as to what the testatrix would have said if she had foreseen the future: *Hunter* v. *Attorney-General.* (1)

In the present case there is not even any paramount intention that Hinckes and Foxley should never be in the same hands. Harry might have held both. The remaindermen other than George's and Harry's descendants might have held both.

The shifting clause no doubt includes and indeed is presumably confined to beneficial possession. But Ralph is not in form or in substance beneficially entitled to the receipt of the rents of the bulk of the Foxley estate. Neither is he entitled to the bulk of the rents of that estate, an entirely different expression not used by the testatrix. He is merely entitled to a rentcharge, clearly charged on the whole corpus, though if the trustees do their duty it will never be necessary to enforce the charge.

ASTBURY J., after stating the facts. The question turns entirely upon the true construction of the shifting clause and of the appointment of May 3, 1900. The latter was an elaborate conveyancing device framed and executed for the purpose of avoiding the shifting clause in the testatrix's will. The question is which of these two conveyancing efforts is to prevail, the one framed to carry out the testatrix's intention, the other to thwart it.

The appointment of 1900 requires careful consideration. [His Lordship read the appointment.] It is not denied that under this document Ralph was at George's death placed in as good a financial position with regard to Foxley as if he had come into possession as life tenant under the previous limitations. But, notwithstanding that, it is contended that the appointment effectually prevented his becoming entitled to the possession or receipt of the rents and profits of the Foxley estate within the meaning of the shifting clause.

The effect of the appointment is, shortly, this: The Foxley estate is limited to the trustees during Ralph's life subject to Ralph's 3700*l.* rentcharge. That rentcharge is charged

(1) [1899] A. C. 309, 315, 317, 321.

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in terms upon the estate, but there is a provision that the amount payable shall not in any year exceed nine-tenths of the net income after payment of other outgoings. The trustees therefore never need resort to capital for the purpose of paying the rentcharge. But the trustees are in fact and in law entitled to and bound to remain in possession or receipt of the rents and profits of this estate in order to carry out their trust. The balance of the income after paying the rentcharge whether that balance equals or exceeds one-tenth of the net rents is payable under the discretionary trust for the benefit of Ralph's wife and family. He is entitled and has already indicated his intention to take a lease of the mansion house at a rent to be set off against his rentcharge, but the benefit of this rent will enure for himself or his wife and family in the proportions mentioned. He is entitled to the same powers of jointuring and portioning that he would have had if the document had never been executed, and his power to revoke and appoint new uses places him in full and efficient control of the estate.

In these circumstances the remaindermen claiming under the shifting clause contend that, in substance and in effect, Ralph has become entitled to the possession and receipt of the rents and profits of the Foxley estate. They further contend that the testatrix intended that the Hinckes and Foxley estates should never be united in the same person. In this respect it is significant that knowing that George was life tenant of the Foxley estate she gave the first life estate in the Hinckes estate to his younger brother, Harry, with remainder to George's son. The remaindermen contend that the shifting clause shows that she wished to provide that after Harry's death the Hinckes estate should always be in the second senior member of the family, the first senior member being presumably entitled to Foxley, the family estate. They further contend that the shifting clause, which is drawn with great skill to avoid many technical causes of failure under previous decisions, ought to be construed according to its substance rather than its bare language.

On the other hand Ralph's case is extremely simple. He

points out that the Court is merely dealing with two carefully drawn pieces of conveyancing, and that the only question is whether legally and in fact he has become actually entitled to the possession or the receipt of the rents and profits of the Foxley Estate, or the bulk of it. He says that no conveyancer reading the 1900 appointment could possibly say that he ever became entitled to the possession or the receipt of the rents and profits as such, but that he merely became entitled in law to a 3700*l.* rentcharge abateable in any year if it exceeded nine-tenths of the net rents, the whole of which subject to his rentcharge were applicable under the discretionary trust for the benefit of other people—namely, his wife and family. He contends that the shifting clause must be strictly construed, and that the event has not occurred.

I do not propose to go through the numerous authorities cited. They merely come to this, that in construing a shifting or any other clause in a will, the testator's intention can only be ascertained from the language and surrounding circumstances. There is no equitable rule or doctrine, as in the case of a clause excluding an elder son from a portion, to justify the Court in construing a shifting clause other than in accordance with the language actually employed, and it has been said in many cases that shifting clauses must be strictly construed accordingly: see *Shuttleworth* v. *Murray* (1) and *Fazakerly* v. *Ford.* (2)

Leslie v. *Earl of Rothes* (3), curiously enough, was relied upon by each side. This and other cases show that the matter must be determined as on the date when the shifting clause is said to have taken effect, in this case George's death. True, there are certain expressions in the judgments to the effect that the will must be looked through to see what the testatrix was aiming at, but it is clear that the shifting clause in question was in fact construed strictly according to its language.

The remaindermen contend that in the present case the Court is not only entitled, but bound to look at the substance of the shifting clause construed with the will as a whole.

(1) [1901] 1 Ch. 819. (2) 4 Sim. 390.
(3) [1894] 2 Ch. 499.

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That is right. But that does not entitle the Court to read into the clause grounds of dispossession other than those to be found in the actual words. I have no doubt that if this testatrix had had the draft of the 1900 appointment before her, she would have directed the shifting clause to have been drawn in very different language.

In the present case, notwithstanding the close powers of control retained by Ralph, and the fact that financially and otherwise he is in substantially as good a position qua Foxley as if the 1900 appointment had never been executed, I feel bound to hold that he has not thereunder become entitled to the possession or receipt of the rents and profits of the Foxley estate or the bulk of the same within the meaning of this shifting clause.

The remaindermen contend that he has become entitled to the bulk of the rents and profits because his rentcharge at present largely exceeds the nine-tenths limit and therefore he is entitled to the entire nine-tenths. I am unable to take that view. The true meaning of the clause is that the shifting is to take place if the person in question becomes entitled to the possession or receipt of the rents and profits of the Foxley estate or the bulk of that estate as an estate. Now although Ralph has become entitled to the possession and receipt of something of equivalent or substantially equivalent value, he has by the conveyancing device to which he was entitled to resort, prevented himself from becoming entitled in fact to the possession or receipt of the rents and profits of the Foxley estate or any part thereof. He has only become entitled to a 3700*l.* rentcharge limited to nine-tenths of their amount. The entire possession and receipt of the rents and profits are in the trustees. Those trustees are not trustees of the estate or rents for Ralph. He has no doubt a power to alter the uses, but the difference between a power and property is plain: see *Bower* v. *Smith.* (1)

If the shade of Theodosia Hinckes be still conscious of what takes place in this imperfect world she may be concerned, perhaps sadly, at the infirmities or ingenuities of lawyers. But, as

(1) L. R. 11 Eq. 279.

Lord Halsbury said in *Hunter* v. *Attorney-General* (1), I am not entitled to take any such matter into consideration or to speculate how she would have framed her shifting clause had she foreseen the way in which the one she actually employed could be evaded.

The result is that there must be a declaration that the shifting clause has not operated in the events that have taken place. The costs of all parties as between solicitor and client will come out of the estate.

Solicitors: *Peake, Bird, Collins & Co.; Bird & Bird; Johnson, Raymond-Barker & Co.*

G. R. A.

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d. *Re* YOUNG (*decd.*). [1950] W.N. 1245.

pplied. *In re* OUNG, DECD. [1951] 1 Ch. 344

In re GARDNER.

HUEY *v.* CUNNINGTON.

C.A. 1920 *July* 8.

[1919 G. 1593.]

Will—Construction—Life Estate to Husband "knowing that he will carry out my wishes" — Subsequent unattested Memorandum — Enforceable Trust.

A testatrix by her will, dated in 1909, bequeathed all her real and personal estate to her husband for his use and benefit during his life, "knowing that he will carry out my wishes." Four days after the date of her will she signed an unattested memorandum expressing her wish that "the money I leave to my husband" should, on his death, be equally divided among certain named beneficiaries. She died in 1919 possessed of personal estate only, and her husband died four days later. After his death his wife's will and the memorandum were found in his safe, and there was parol evidence that shortly after the execution of the will the testatrix had said, in his presence, that her property after his death was to be equally divided between the named beneficiaries, and that he assented thereto:—

Held, that the husband, who took jure mariti the corpus of his wife's estate for his own benefit, could not properly refuse to carry into effect her wishes as to the disposition of the property after his death, expressed to him by her before her death, and assented to by him. He therefore

(1) [1899] A. C. 309, 315, 317.

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held the corpus, subject to his life interest, as a trustee for the beneficiaries named in the memorandum.

Principle stated in *McCormick* v. *Grogan* (1869) L. R. 4 H. L. 82, 88 and *French* v. *French* [1902] 1 I. R. 172, 230 applied.

Decision of Eve J. [1920] 1 Ch. 501 reversed.

APPEAL from a decision of Eve J. (1)

By her will, dated April 23, 1909, Elfrida Gardner gave and bequeathed all her real and personal estate of every description to her husband, Herbert Gardner, for his use and benefit during his life, "knowing that he will carry out my wishes"; and she appointed her husband sole executor of her will. The testatrix died on April 9, 1919, possessed only of personal estate of the value of 3000*l.* Herbert Gardner survived his wife only a few days and died on April 14, 1919, leaving no children nor the descendant of any child, and he did not prove her will.

By his will dated July 19, 1916, Herbert Gardner appointed the plaintiffs, Isaac M. Huey and Ellen Sidney Whitlock, executors and trustees, and, after making certain pecuniary and specific bequests, purported, in alleged pursuance of a testamentary power of appointment which he did not possess, to appoint three sums of 1000*l.* to Mabel Olive Hope Bayly, May Cunnington, and Lancelot Brodrick respectively; and he gave his residuary personal estate to his wife, Elfrida Gardner, absolutely. By a second codicil he appointed the third plaintiff, Lewis William Taylor, to be an additional executor and trustee of his will and codicils. The plaintiffs duly proved the will and codicils on June 4, 1919.

On August 9, 1919, letters of administration with the will annexed of Elfrida Gardner were granted to the plaintiffs. Soon after the testatrix's decease the plaintiff L. W. Taylor found her will in her husband's safe, and with it an unwitnessed paper dated April 27, 1909, and signed by Elfrida Gardner, containing these words: "My wishes are that the money I leave to my husband should, on his death, be equally divided among my nieces and nephew, viz., May Cunnington, Mabel Olive Hope Bayly, and Lancelot Brodrick. In the event of

(1) [1920] 1 Ch. 501.

May Cunnington not surviving my husband then the money to be divided between M. O. H. Bayly and L. Brodrick in equal parts." M. O. H. Bayly died on October 9, 1917. Questions having arisen on the construction of the will of the testatrix and the effect of the memorandum, the plaintiffs, as legal personal representatives of the testatrix, took out an originating summons asking whether the bequest of her residuary estate to her husband for life knowing that he would carry out her wishes created a trust in favour of the surviving niece and nephew, or whether Herbert Gardner became absolutely entitled to his wife's undisposed of residuary estate. M. Cunnington and L. Brodrick were made defendants, and the third defendant, Austen Gardner, represented the next of kin of Herbert Gardner.

One of the plaintiffs, Ellen Sidney Whitlock, made an affidavit in which she stated that one day early in the year 1909 Elfrida Gardner told her, in the presence of Herbert Gardner, that her property after his death was to be divided between her two nieces and nephew—namely, the defendant, M. Cunnington, M. O. H. Bayly, and the defendant L. Brodrick, and that Herbert Gardner signified his assent.

On the hearing of the summons Eve J. held that the residue of the testatrix's estate passed to Herbert Gardner, and, in the event which happened of his death intestate, devolved upon his statutory next of kin.

The defendants M. Cunnington and L. Brodrick appealed.

Farwell for the appellants. The wrong principle was applied by Eve J. When a person gives property to another or permits it to go to him as next of kin on the faith of an understanding that the donee assented to a trust, it fixes upon his conscience. Here the appellants were obliged to resort to the unattested memorandum of the testatrix's wishes, and Eve J. held that they could not do so because it was dated after the will. The appellants' case is not rested upon the document, except that they treat it as evidence of what the testatrix's wishes were. She left her property in this way on the faith that her husband would carry out

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those wishes. The principle is based upon the refusal to comply with the promise being treated as fraud, or upon the promise being binding upon the conscience of the donee. The principle is stated by Lord Hatherley L.C. in *McCormick* v. *Grogan* (1) and by Lord Westbury in the same case. (2) They both put it on the ground of personal fraud; but, of course, to constitute a fraud there must be a distinct and positive promise, the non-fulfilment of which brands the party with disgrace as having personally imposed on the testator. (3) It is also stated by Lord Davey in *French* v. *French*. (4) If the Court in this case accepts the evidence of Mrs. Whitlock then the principle of these cases applies. I rely also upon the verbal communication of the testatrix's wishes to the husband, and his assent thereto, even if it were only a tacit assent. The object of the memorandum was to keep the promise alive in the memory of the husband.

Johnson v. *Ball* (5), upon which Eve J. relied, and *In re Gardom* (6) have no application to the present case.

C. D. Myles for the respondents, the next of kin of Herbert Gardner. Upon construction it is submitted that the view taken by Eve J. was right. All the husband takes under the will is a life interest, and the words "knowing, etc.," apply only to that life interest. Where on the face of the will the trustee does not take beneficially no undisclosed trust can be enforced the terms of which were not communicated to him before or at the date of the will. Here the memorandum of the testatrix's wishes was made after the date of the will and the trust is therefore not enforceable: *In re Hetley* (7); *In re Boyes* (8); *Johnson* v. *Ball* (5); *In re Fleetwood* (9); and *In re Gardom*. (6)

H. T. Methold for the plaintiffs.

LORD STERNDALE M.R. The difficulty in this case is occasioned by the will and the memorandum of the testatrix's

(1) L. R. 4 H. L. 82, 88.
(2) Ibid. 97.
(3) Ibid, 99.
(4) [1902] 1 I. R. 230.
(5) (1851) 5 De G. & Sm. 85.
(6) [1914] 1 Ch. 662.
(7) [1902] 2 Ch. 866.
(8) (1884) 26 Ch. D. 531.
(9) (1880) 15 Ch. D. 594.

wishes being in rather unsatisfactory form. The will is in these terms: [His Lordship read the will and continued:] That will seems to me to dispose of the life interest only. As to anything beyond the life interest the will does not dispose of it, and anything which is said in the will does not affect it. The words "knowing that he will carry out my wishes," when confined to the gift of the life estate have possibly not very much meaning, but I think that is the result of the will. There were no children. The husband took the capital during his lifetime. He died four days after his wife without having proved her will, and therefore in his lifetime no question arose at all as to what he would have done with the capital. But it is said that he could only take it on the terms of disposing of it according to wishes which had been expressed to him by his wife and to which he had assented, those wishes being that the property should be divided amongst two nieces and a nephew. The evidence as to the expression of the testatrix's wishes to her husband, and his assent to them, is comprised partly in the evidence of Mrs. Whitlock who was an executrix of the will and partly in the evidence of the solicitor with regard to what he found after the husband's death. The evidence of Mrs. Whitlock was that she knew the testatrix and her husband very well, and that she remembered that the testatrix told her one day, in the presence of the testatrix's husband, that her property after Mr. Gardner's death was to be divided between her two nieces and nephew—then their names were mentioned—"and the said Herbert Gardner signified his assent." She says the conversation took place, as far as she could remember, one afternoon early in the year 1909, and the statement was made to her in the following circumstances: "The testatrix informed me that my husband"—that is the deponent's husband—"had witnessed her will," and it was in talking of the will that she made this statement. That may or may not show that this conversation took place after or before the making of the will. I should be rather inclined to think that it meant that the conversation took place afterwards, because the witness says that the testatrix

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informed her that her (the deponent's) husband had witnessed the will. But it may very well be that it was only a repetition or only a statement of a communication made to the husband before the date of the will, the conversation taking place afterwards. I will however assume that the communication was made after the will. The evidence of the solicitor is this: that after the testatrix's death he found her will in her husband's safe and with it there was a paper, the memorandum, which says: "My wishes are that the money I leave to my husband should on his death be equally divided among my nieces and nephew"—then it gives their names. "In the event of May Cunnington not surviving my husband then the money is to be divided between Mabel Olive Hope Bayly and Lancelot Brodrick in equal parts." That speaks of "the money I leave to my husband." Of course she had only left him in fact a life interest, but she, I should assume, knew pretty well that the result of not giving the corpus to anybody else would be that he would get it, and I think she may very well have described the whole as "the money I leave to my husband." The husband having died four days after his wife the question now is whether his next of kin or the surviving niece and the nephew are entitled to two-thirds of the corpus. It seems to me that the position is just the same as if there had been no gift to the husband for life, but that the whole of the money had come to him under an intestacy with an intimation of the intestate's wishes that he should have a life interest, and that after his death the money should be distributed according to her wishes, and that he had assented to that. In that case I do not think there can be any question that, at whatever time the communication of the wishes and the assent to them took place, the person getting the money would be bound to act according to the wishes of the intestate. As I have said the will itself does not dispose of anything but the life interest, and there is an intestacy as to the corpus. The position therefore to my mind with regard to that portion of the estate as to which there is an intestacy is exactly the same as if there had been no will at all, and as the husband

did have communicated to him his wife's wishes, and did assent I think he, and as he is dead, his next of kin, are bound to act in accordance with them. He became a trustee, and they are trustees, for the persons designated by the testatrix.

The cases that have been cited where there is a gift to trustees, who are not beneficially interested at all, upon certain trusts not named in the will, do not seem to me to have any bearing at all on this case. The obligation upon the husband and his next of kin seems to me to arise from this, that he takes the property in accordance with and upon an undertaking to abide by the wishes of the testatrix, and if he were to dispose of it in any other way he would be committing a breach of trust, or as it has been called in some of the cases a fraud. I do not think it matters which you call it. The breach of trust or the fraud would arise when he attempted to deal with the money contrary to the terms on which he took it.

There is only one other point that has been mentioned to which I need allude. It is rightly said that in order to apply that doctrine the trusts upon which the person takes the money must be clearly defined. It is said that there is here a difference between the evidence given by Mrs. Whitlock and the wishes of the testatrix as expressed in the document which I have read, because Mrs. Whitlock does not include in her evidence any statement of the provision that in the case of the death of May Cunnington in the lifetime of the husband the money was to be divided between the other two. I do not see myself any discrepancy between the two statements. I do not think Mrs. Whitlock purports to be setting out every detail. She is only stating or expressing the substance of the wishes to which the husband had assented, and she was not speaking as a lawyer; she was only expressing the substance of the testatrix's wishes, and she did so quite correctly, that is that these three persons were to have the property divided between them after the husband's death. I think there is nothing inconsistent with that in the fact that certain details of what was to happen if one of them died in the husband's lifetime were added in that

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document which was given to him, and undoubtedly kept by him, as the expression of his wife's wishes. I think therefore that this appeal should be allowed. The costs will come out of the estate as ordered in the Court below. The form of the declaration will be settled afterwards.

WARRINGTON L.J. I am of the same opinion and think the case a very simple one. I venture to think that in the Court below, it was to some extent confused partly by the view the learned judge expressed on the construction of the will, and partly by the discussion which arose whether or not the document which was dated four days after the will could be referred to as expressing a trust imposed on the husband. The question is really this: Can the husband, who, as the result of the particular form in which the testamentary disposition of the wife is made, takes at law for his own benefit the corpus of her personal estate, properly refuse to carry into effect a wish as to the disposition of that property expressed to him by the wife before her death and assented to and accepted by him? The principle upon which the jurisdiction of the Court is based is stated, in extremely clear language, by Lord Davey in *French* v. *French* (1): "The basis of the jurisdiction"—that is the jurisdiction to which I have referred—"is of course that the testator has died, leaving the property by his will in a particular manner on the faith and in reliance upon an express or implied promise by the legatee to fulfil his wishes, and your Lordships will at once see that it makes no difference whatever whether the will be made before the communication to the legatee or afterwards, because, as was said, I think, by Vice-Chancellor Turner in one of the cases which were cited, the presumption is that the testator would have revoked his will and made another disposition if he had not relied upon the promise, express or implied, made by the legatee to fulfil his wishes."

It is quite true that Lord Davey there is dealing only with the case of a legatee who takes property by virtue of some direct gift in the will. But in my opinion it makes no

(1) [1902] 1 I. R. 172, 230.

difference to the principle whether the property which the person in question takes is taken by virtue of an express gift in the will, or whether it comes to him as the result of the imperfect disposition of the testator's property which the will has made. In this case the testatrix gave all her real and personal estate of every description to her husband for his use and benefit during his life "knowing that he will carry out my wishes" and she appointed him her executor. That is the whole of the will.

In my opinion on the construction of the will there is neither any gift to the husband of the corpus of the estate, nor is there any expression by the testatrix on the face of the will of her wishes with regard to the disposition of the corpus of the estate. It seems to me that these words "knowing that he will carry out my wishes" refer to the gift which she has made of the life estate. What those wishes were we do not know. They may have been to continue allowances or to continue charitable subscriptions. We do not know what they may have been, but whatever they were, it seems to me that those wishes refer only to the life estate. We have then the clear case of a will which, by reason of the imperfection of its dispositions has the result that the husband takes this property for his own benefit. The only question is whether in accordance with the principle enunciated by Lord Davey in the case to which I have referred he can keep the corpus of the estate for his own benefit. The evidence is I think quite clear that the testatrix wished that the corpus of her property should be divided after his death between three persons, two nieces—one of whom is one of the appellants and the other of whom died in the testatrix's lifetime—and a nephew who is the other appellant. I think that is quite plain. It is evidenced by a document dated four days after her will, found, after her death, in her husband's safe enclosed in an envelope which contained her will and a copy of his will. It is also evidenced by a conversation deposed to by an intimate friend in whose presence the testatrix stated that her property after the husband's death was to be divided between the same people, and the husband

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signified his assent to that statement. In my opinion, taking those together, there is sufficient evidence that the testatrix communicated to the husband what her will was, and what her wishes were outside the will, and that he assented to and undertook the obligation imposed upon him, and that he knew that he would take the corpus of her property under an express or implied promise to carry into effect the wishes which she had so communicated to him.

Johnson v. *Ball* (1) and *In re Gardom* (2) appear to me to have no reference to a case such as the present. Those were cases in which the person on whom it was sought to impose the trust did not take under the terms of the will for his own benefit; he took expressly under the terms of the will as trustee. In such cases as that the trusts upon which the trustee is to hold the property must be contained in the will itself, or in some document in existence at the date of the will, or it may be, if *In re Fleetwood* (3) was properly decided, declared by parol and accepted by the trustee at or before the execution of the will. But that limitation "at or before the execution of the will" has no application, as was pointed out by Lord Davey in *French* v. *French* (4), to such a case as that with which we have to deal. In my opinion therefore the order of Eve J. ought to be set aside and the two appellants, that is to say the niece May Cunnington and the nephew Lancelot Brodrick, are each entitled to one-third share of the estate left by the testatrix.

YOUNGER L.J. I am of the same opinion. The view which we take of this case relieves it of the difficulties which I think led Eve J., somewhat reluctantly, to come to the conclusion at which he arrived. As the case presents itself to my mind it really is a simple one. That there was an agreement between this testatrix and her husband as to the way in which her property—which, be it remembered, was entirely personal estate—was to be disposed of after her husband's death, I have, on the evidence which was filed on this summons, no

(1) 5 De G. & Sm. 85.
(2) [1914] 1 Ch. 662.
(3) 15 Ch. D. 594.
(4) [1902] 1 I. R. 172.

doubt at all. The evidence of Mrs. Whitlock as to the conversation which took place on the subject between her and the testatrix in the husband's presence is, I think, quite express and satisfactory; but if one did have any doubt as to the substantial accuracy of her recollection, or as to the assent of the husband to the arrangement as then stated by the testatrix, that doubt would be removed by the fact that we have the arrangement reduced into writing in the form of a memorandum, which was found after the husband's death in his own safe together with his own will, embodying with an unimportant variation the terms of the conversation as remembered by Mrs. Whitlock. We have in these materials abundant evidence that an arrangement between this lady and her husband in the terms now sought to be enforced by the appellants was in fact come to, and I cannot doubt that on the faith of that arrangement this lady's property, subject to her husband's own life interest therein, was left by her undisposed of by will so that it devolved upon the husband jure mariti. The trouble really arises from the method adopted by the testratrix and her husband to carry out their arrangement. The testatrix's will, as I have said, deals, in my view, on its true construction only with the life interest which in accordance with the arrangement it was always her desire that her husband should have for himself, and I think that to the words which follow the gift to him of the life interest—"knowing that he will carry out my wishes"—it is not permissible for a Court of construction to attach any meaning other than that the wishes referred to were wishes expressed with reference to the disposal of that life interest. Now no such wishes are shown to have been expressed, and indeed I think in all the circumstances of this case it is almost pedantry to express any belief that any such wishes were those to which by these words the testatrix really intended to refer. I cannot think that there were any wishes expressed by her at all as to what her husband was to do with the fund during his own life. Everything points to the conclusion that he was to have that for himself. And if one may conclude so much

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and interpret the phrase on that footing the only other meaning that can properly be attributed to these words "knowing that he will carry out my wishes" I think would be: "I have given him a life interest knowing that he will carry out my wishes with reference to what remains if by this my will I give him no more than such an interest," an expression which would certainly have imposed no trust upon him with reference to his life interest in the property, and the question is whether the arrangement outside the will which was come to between the husband and his wife with reference to the property now in question—of which there is ample evidence—is now enforceable as against the husband's representatives, he himself being dead.

Now there being no trust anywhere declared with reference to the property it is quite immaterial whether the assent which the husband gave, and is shown to have given, to the arrangement which his wife desired to have carried out, was given before or after the will; and this too gets rid of the difficulty, so much insisted upon by counsel for the respondents, that here the husband's representatives are entitled to keep this fund because without fraud the husband himself could have done so, owing to the fact that there is some divergence between the particular manner in which according to Mrs. Whitlock's recollection the fund in one event was to devolve, and the way in which by the memorandum it was to devolve in the same event. That difficulty is I think got rid of by the fact that, it being quite immaterial when the assent was given, the arrangement to which he did assent must be taken to have been that which is embodied in the memorandum kept by him in his own possession. But further this point is, in the event, purely academic. It is quite plain that according to the arrangement, whatever in other respects it was, no part of this reversionary interest was to be kept by the husband for himself. It was to be for the two nieces and the nephew; and as it happens as between them the suggested discrepancy is in the event immaterial. In accordance, therefore, with all the authorities it appears to me that in these circumstances the husband would not

have been entitled to keep this fund had he lived. It would have been, as the cases say, a fraud on his part to do so. Equally would it be a fraud for those who claim under him as volunteers to do so. Accordingly, in my opinion, the appellants are entitled to succeed. This appeal must therefore be allowed, and the declaration made which the Master of the Rolls proposes to read.

LORD STERNDALE M.R. The declaration will be according to the notice of appeal "that a valid trust was created by the above-named testatrix Elfrida Gardner of her residuary estate after the death of Herbert Gardner in favour of the defendants, May Cunnington, Lancelot Brodrick, and Mabel Olive Hope Bayly, and that the defendants May Cunnington and Lancelot Brodrick are each of them now, in the events which have happened, respectively absolutely entitled to one-third part of the residuary estate of the said testatrix, Elfrida Gardner."

Appeal allowed.

Solicitors: *Burgess, Taylor & Tryon; Norman Orfeur, for Cunnington, Son & Orfeur, Braintree; Ernest W. Essell, for C. A. Gardner, Canterbury.*

G. A. S.

PETERSON J.

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June 1, 2, 15.

In re COOLE.

COOLE *v.* FLIGHT.

[1919. C. 345.]

Will—Married Woman—Incapacity to devise—Marriage before Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75)—*Possessory Title by Husband against her Heir at Law—Concealed Fraud—Election—Estoppel—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4 *c.* 27), *s.* 26—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

In 1881 a woman seised in fee simple of two freehold houses and possessed of a long-leasehold shop, but not in either case to her separate use, married a solicitor. On May 10, 1883, she purchased the freehold reversion of the shop. She died in 1897 without ever having had any issue, having by her will, made in 1888, devised "all" her "freehold shop" to her trustees upon trust for sale and to pay a sum of 1300*l.* out of the proceeds to certain named persons, and "all the residue of the real estate over which" she "had a disposing power" to her husband for life, to whom she also bequeathed all other her personal estate absolutely, and from and after his death she devised "all other" her "real estate" to her trustees upon trust for sale and to pay and divide the net proceeds as therein mentioned. The husband, the sole surviving executor and trustee, proved the will and elected to pay and paid estate duty on the real estate passing on his wife's death. He went into, and remained in, possession of all her real estate until his death in 1917, without giving any acknowledgment of the title of the heir at law. He appointed the plaintiffs executors of his will which contained a devise and bequest of his real and residuary personal estate. Upon a summons for the determination of the parties entitled to the properties in question:—

Held, as to the two freehold houses:—

(1.) That on the facts the husband had not been guilty of any concealed fraud within s. 26 of the Real Property Limitation Act, 1833, and that the claim of the wife's heir at law was barred.

Willis v. *Earl Howe* [1893] 2 Ch. 545 and *In re McCallum* [1901] 1 Ch. 143 applied.

(2.) That the doctrine of election did not operate, inasmuch as the husband had no title to the houses when his wife died, and that even assuming (contrary to what in his lordship's opinion was the true effect and construction of the will) that the will purported to give the husband and remaindermen an interest or benefit in the houses in question, they were not estopped from saying that the houses did not pass under the wife's will.

In re Anderson [1905] 2 Ch. 70 applied.

Held, as to the shop:—

That the husband's marital interest in the term prevented merger, but that as the wife had purported to deal with the whole interest in

the shop, and not merely the reversion, and that as the husband took a life interest in it subject to the charge of 1300*l.*, and had accepted his wife's personal estate, he must be treated as having elected to allow his interest in the shop to pass under his wife's will.

PETERSON J.

1920

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ADJOURNED SUMMONS.

Previously to her marriage with Arthur Cook Coole the above-named testatrix, Ellen Selby Coole, was the widow of Robert Pickett (her second husband), who died on July 23, 1880, having by his will bequeathed to her his leasehold shop and premises, No. 57, West Street, Horsham, and devised to her his freehold messuage at Horsham called Rustington Cottage. No separate use was declared by his will in respect of either property. At the time of his death No. 57, West Street, was held by him for the residue of a term of 1000 years, at the yearly rent of 10*s.*, under a lease dated December 3, 1813.

On August 23, 1881, a freehold house called "Heatherleigh," North Parade, Horsham, which had been purchased by Ellen Selby Coole (then E. S. Pickett, widow), was conveyed to her in fee simple but not to her separate use.

On the following day, August 24, 1881, Ellen Selby Coole intermarried with Arthur Cook Coole, a solicitor. No settlement was made on this or any previous marriage of Ellen Selby Coole, and there never was issue of any of her marriages.

On May 10, 1883, No. 57, West Street, was conveyed to Ellen Selby Coole in fee simple subject to the said lease. The conveyance contained no declaration against merger.

By her will dated July 18, 1888, the testatrix appointed her husband, her brother (who predeceased her), and her sister (who died before probate) to be her executors and trustees, and after various specific bequests, including a life interest in her household furniture and effects to her husband, she devised and bequeathed "all that my freehold house and shop No. 57 West Street" to her trustees upon trust for sale in manner therein mentioned, "and as to the net monies to arise therefrom after paying all expenses with reference thereto to pay the sum of 1300*l.* to and equally

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between my said sister-in-law Ann Peskett and my brother-in-law George Pickett" followed by a declaration that if either of them died before the testatrix leaving issue such issue should take the share which their parents would have taken if they had survived her.

Then the testatrix made the following disposition: "I devise all the residue of the real estate to which I may be entitled at my decease and over which I have a disposing power to my said husband Arthur Cook Coole for and during his life without impeachment for any manner of waste And I bequeath all other my personal estate to my said husband for his absolute use and disposal and from and after the decease of my said husband I devise all other my real estate to" the other named trustees "their heirs executors administrators and assigns upon trust to sell the same in the same manner as hereinbefore directed with reference to No. 57 West Street and to pay and divide the net monies to arise therefrom to and equally between my brothers and sisters" therein named.

The testatrix died on May 27, 1897, and her husband, Arthur Cook Coole, as sole surviving executor, proved her will on November 22, 1898. In his affidavit for probate he declared that in addition to the estate duty on the personal property of the testatrix he elected to pay the estate duty on the real estate passing on the testatrix's death, particulars whereof, including "Heatherleigh" and "Rustington Cottage," were set out in the fifth account in the affidavit. He went into possession of the real estate of the testatrix from the time of her death and remained in possession until his own death on December 20, 1917, without giving any acknowledgment of the title of the heir atl aw. He paid to Ann Peskett her moiety of the 1300*l.* charged on No. 57, West Street, but George Pickett, the legatee of the other moiety, was believed to have died without issue in the lifetime of the testatrix.

The testatrix's heir at law was her eldest brother, who was not mentioned in her will and who died in 1910. His executors were defendants.

By his will A. C. Coole appointed the plaintiffs his executors and trustees, and under the provisions thereof, and in the events which had happened, the defendants, Elizabeth Jobbins and Caroline Gobey, were entitled to his real and residuary personal estate.

Certain written instructions left by the testator to his executors contained the following passage with reference to the will of his wife, the testatrix: "It will be seen that the furniture over which my wife had a disposing power was given to me for life and afterwards to Mrs. Moreton, but as we were married before the Married Woman's Protection Act of 1883, I say the furniture passed absolutely to myself as husband."

The defendant F. R. Slater was entitled under the residuary devise in the will of the testatrix.

The plaintiffs took out this summons for the determination (inter alia) of the question what persons were in the circumstances entitled to the properties in question.

Whitmore Richards for the plaintiffs.

Manning K.C. and *J. G. Wood* for the executors of the heir at law. The heir at law became entitled to Rustington Cottage and Heatherleigh on the death of the testatrix, which was previous to the Land Transfer Act, 1897, and so A. C. Coole, as executor, was not concerned with her real estate. Neither was he concerned to pay estate duty in respect of it unless requested to do so by the heir at law, who was alone accountable: Finance Act, 1894, s. 6 (2.); s. 8 (4.). His only duty was to give the necessary information to the Estate Duty Office as to the person accountable, but instead of doing so he paid the duty as being tenant for life under his wife's will, and he entered into possession of these houses and remained in possession from 1887 to 1917. In these circumstances this was a case of concealed fraud within s. 26 of the Real Property Limitation Act, 1833: *Willis* v. *Earl Howe* (1); *Lawrance* v. *Lord Norreys*. (2) By accounting

(1) [1893] 2 Ch. 545, 551. (2) (1890) 15 App. Cas. 210.

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for the duty he actively took steps to deprive the heir at law of his rights : *In re McCallum* (1) ; *Vane* v. *Vane.* (2)

Cunliffe K.C. and *Vaisey* for the defendant F. R. Slater, residuary devisee of the testatrix. We submit that A. C. Coole acquired a statutory title to these two houses by adverse possession ; against that result it is said that he was guilty of concealed fraud. But the Finance Act, 1894, does not put any duty on an executor towards the heir-at-law, and there can be no case of concealed fraud unless there is some antecedent breach of duty.

The husband entered into possession as tenant for life on the assumption that his wife's will was valid, and acted upon it, and he " cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will " : per Mellor J., in *Board* v. *Board.* (3) He had to elect, and having gone in under the will, and subsequently acquired the property by adverse possession against the heir-at-law, that acquisition enures for the benefit of the devisees under the will : *Yem* v. *Edwards.* (4)

Further, A. C. Coole and the plaintiffs are estopped from denying that this real estate was his wife's. When an executor has in another branch of the Court sworn that this was his wife's property, he cannot in this Court be heard to say that it was his and not hers. He took a certain course and accepted probate of her will giving this property in trust for other persons, and he thereby constituted himself trustee of the property under the will, and he or his executors must deal with it according to the provisions of the will.

On the construction of the will and in the events which have happened, a clear case of election arose in the case of No. 57, West Street, which must be regarded as passing under the wife's will to her residuary devisee.

Hughes K.C. and *Arnold Jolly* for the defendants E. Jobbins and C. Gobey, residuary devisees of the testator. Concealed fraud is out of the question. That term imports an element

(1) [1901] 1 Ch. 143.
(2) (1873) L. R. 8 Ch. 383.
(3) (1873) L. R. 9 Q. B. 48, 54.
(4) (1857) 1 De. G. & J. 598.

of dishonesty or designed fraud: per Kay L.J. in *Willis* v. *Earl Howe* (1), and that cannot be suggested here, for there is nothing inconsistent with A. C. Coole thinking that the two houses in question passed under the gift of residue and treating them as devised by his wife's will. *In re McCallum* (2) turned on deliberate concealment, which is entirely absent from this case.

With regard to the arguments on election and estoppel, the husband in fact entered into this property not as tenant for life but as a mere trespasser, for the devise of real estate over which the testatrix had a disposing power did not in fact on the construction of the will dispose of this property at all. He entered as a trespasser and remained in possession for more than twenty years. The will was inoperative to pass the property in question, and there was therefore no will at all of the real estate and no question of election arises: *Hearle* v. *Greenbank* (3); *In re De Virte* (4); and *In re Anderson.* (5)

In *In re Anderson* (5) Buckley J. distinguished between cases where a testatrix had a good title but her will was insufficient to pass her real estate, and cases like *Board* v. *Board* (6) and *Dalton* v. *Fitzgerald* (7) and other cases referred to on p. 132 of Carson's Real Property Statutes, 2nd ed., where the testator or settlor had no title at all. Further, even if on the construction of this will the devise did cover the houses in question, the husband's executors are not estopped from saying that the attempted testamentary disposition by the testatrix was invalid, and that he acquired a good title by adverse possession: *In re Anderson.* (5) The fact that he may have thought that he was in under a good title did not prevent him from acquiring a title under the Statute of Limitations: *Governors of Magdalen Hospital* v. *Knotts.* (8)

With regard to No. 57, West Street, the husband acquired a sufficient interest to prevent merger, and the testatrix only

(1) [1893] 2 Ch. 545, 551.
(2) [1901] 1 Ch. 143.
(3) (1749) 3 Atk. 695, 715.
(4) [1915] 1 Ch. 920.
(5) [1905] 2 Ch. 70.
(6) L. R. 9 Q. B. 48.
(7) [1897] 2 Ch. 86.
(8) (1879) 4 App. Cas. 324.

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partially disposed of her interest in the reversion which subject thereto was undisposed of and passed to her heir at law: *In re Fraser* (1). There can be no question of election in respect of this house. The heir at law being barred, it passed under the husband's will.

Vaisey in reply. Whatever estate or interest was acquired by the husband enured for the benefit of the remaindermen under the wife's will; Jarman on Wills, 6th ed., vol. i., p. 558, and the cases there cited. There was no question of election in *In re Anderson* (2), and it is difficult to reconcile that case with *Dalton* v. *Fitzgerald.* (3)

Cur. adv. vult.

June 15. PETERSON J., after stating the facts and material provisions of the will, continued: The first question is: who is entitled to Heatherleigh and Rustington Cottage? It is contended that Mrs. Coole had no power to dispose by will of these properties, and that Mr. Coole was not entitled to any interest in them as tenant by the courtesy. During the joint lives of himself and Mrs. Coole, Mr. Coole was entitled to a freehold interest in the two properties. He continued in possession till his death in December, 1917. The person who at Mrs. Coole's death became entitled to these houses was her heir at law, but his claim is barred by the Real Property Limitation Act, 1874, unless it can be shown that Mr. Coole was guilty of a concealed fraud within s. 26 of the Real Property Limitation Act, 1833. It was contended, having regard to the following facts, that Mr. Coole had committed a concealed fraud. He was a solicitor, and alone proved his wife's will. He made the affidavit leading to probate, and in it he declared that in addition to the estate duty on the personal property of the testatrix he elected to pay the estate duty on the real estate passing on the death of the testatrix, the particulars of which were set out under the fifth account in the affidavit. Those particulars included the two houses in question. He paid the estate duty on the

(1) [1904] 1 Ch. 726, 734. (2) [1905] 2 Ch. 70.
(3) [1897] 2 Ch. 86.

whole of the testatrix's estate. It was pointed out that under s. 6 of the Finance Act, 1894, as the testatrix's real estate was not under his control as executor he was only entitled to pay the estate duty in respect of the houses if the person accountable for the duty in respect thereof—that is to say, Mrs. Coole's heir-at-law—requested him to make the payment. This request was not made. The executor's duty was, under s. 8, merely to give particulars of the testatrix's real estate, and it was said that if he had done this, and declined to pay the duty on these houses, the result would have been that the Commissioners of Inland Revenue would have required payment of duty from the heir at law, who would thus have become aware of his rights. I was asked to hold that Mr. Coole had been guilty of a concealed fraud, on the ground that Mr. Coole, who was a solicitor, must be taken to have known that the property in question could not pass under his wife's will, and that he determined to conceal the real position from the heir, and did so by paying the duty, and so preventing the Commissioners from having recourse to the heir. Whatever may be meant by the word "concealed" in the phrase "concealed fraud," it is plain that I must be satisfied that Mr. Coole was guilty of fraud. See *Willis* v. *Earl Howe* (1) and *In re McCallum.* (2) But the facts of this case are perfectly consistent with the view that Mr. Coole forgot, or was ignorant of, the law relating to such real estate of his wife as was not governed by the Married Women's Property Act, 1882. Reliance was placed on some written instructions which he left for his executors, in which he said that: "The furniture over which my wife had a disposing power was given to me for life and afterwards to Mrs. Moreton, but as we were married before the Married Woman's Protection Act of 1883, I say the furniture passed absolutely to myself as husband." He seems to have had some idea that the Married Women's Property Act of 1882 had made a difference in the case of a wife's personal property, and that apart from it the husband was entitled to it. But he plainly had no very accurate knowledge of the Act, or of the law

(1) [1893] 2 Ch. 545. (2) [1901] 1 Ch. 143.

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in dispute (such as *Board* v. *Board* (1) and *Dalton* v. *Fitzgerald* (2)), and the case of a person who has a title but does not, because she cannot, devise (such as *Paine* v. *Jones* (3)), and held that the husband was not estopped from saying that the disposition of the Worksop property was invalid, I think I ought to follow the decision in *In re Anderson* (4), and consequently I hold that Mr. Coole's representatives are not estopped from saying that these two houses did not pass under his wife's will.

Some reliance was placed on the fact that this property appears in the husband's affidavit leading to probate. But the particulars were given for the purpose of ascertaining the amount of the duties which were payable whether the property passed under her will or not, although no doubt the proper person to pay the estate duty in respect of those two houses was not Mr. Coole. I do not think that this fact is sufficient to prevent Mr. Coole or his representatives from saying as against the remainderman on whom, in fact, this inoperative will did not confer any benefit in the two houses that the property did not pass by the will. At most, it is evidence that he thought that the property passed under the will, and cannot have greater effect than the devise or attempted devise of the property in specie as in *In re Anderson*. (4)

The next question relates to No. 57, West Street. Before her marriage with Mr. Coole, Mrs. Coole had a long leasehold interest in this house, which she had no power to bequeath by her will. After the commencement of the Married Women's Property Act, 1882, she acquired the freehold reversion in this house, and was consequently able to dispose of the freehold interest by her will. It was admitted that, having regard to Mr. Coole's interest in the leasehold term, there was no merger of the term in the freehold reversion, and that Mr. Coole, by virtue of his marital right, was entitled to the leasehold interest on his wife's death. The testatrix, however, devised her "freehold house and shop, No. 57, West

(1) L. R. 9 Q. B. 48.
(2) [1897] 1 Ch. 440; [1897] 2 Ch. 86.
(3) (1874) L. R. 18 Eq. 320.
(4) [1905] 2 Ch. 70.

Street." In my opinion this was not a mere devise of her freehold interest in the house, but a devise of the house itself, which the testatrix described as being of freehold tenure.

The testatrix, therefore, purported to deal with the house itself, and treated herself as having a disposing power over the house, and not merely over the freehold reversion in it. On the construction of the will, the entirety of the interest in the house, after satisfying the charge of 1300*l.*, was included in the devise of the residue of the real estate over which the testatrix had a disposing power, for her previous disposition of this house shows that she thought she had a power to dispose of it. Under the provisions of the will then, Mr. Coole took a life interest in it, and subject to the charge and his life interest, it was given as part of "all other my real estate" on trust to sell and divide the proceeds. It was said that the words "all other my real estate" mean all my real estate other than 57, West Street, and it was argued that this is supported by the direction to sell in the same manner and upon the same trusts and conditions as thereinafter directed with reference to 57, West Street, but this direction, in my opinion, only amounts to a declaration that the provisions for sale which are set out at length in connection with 57, West Street, shall apply to all the testatrix's real estate which is subject to the devise, and the devise of all other the testatrix's real estate is a residuary devise after Mr. Coole's death, either of the real estate over which the testatrix had a power of disposition or of her real estate, including the real estate over which she had not a power of disposition. In these circumstances, the question is whether Mr. Coole was not put to his election. The testatrix bequeathed all her personal estate to Mr. Coole, and purported to deal with an interest in 57, West Street, to which he was entitled. He accepted the personal estate under the will, and must, in my opinion, be treated as having elected to allow his interest in No. 57, West Street, to pass under the dispositions of his wife's will.

Solicitors: *H. H. Wells & Sons; Beamish, Hanson, Airy & Co., for Shenton & Pain, Winchester; Lees, Smith & Tetlow.*

R. M.

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apart from the Act, for, in addition to an inaccurate description of so well known a statute, he appears to have thought that his wife had a disposing power over the furniture which, in fact, vested in him on the marriage. Moreover, those instructions seem to show that he thought that the residue of his wife's property passed under her will. I have come to the conclusion that there is no foundation for the suggestion that Mr. Coole was guilty of any fraud or a concealment of fraud. I have no doubt that he thought that the houses in question passed under his wife's will.

The result, therefore, is that Mr. Coole acquired a statutory title to these two houses against his wife's heir at law.

The next question is whether Mr. Coole, having acquired a statutory title to the two houses as against the testatrix's heir-at-law, the houses belonged to him absolutely, or whether they are to be treated as being governed by the will of the testatrix, with the result that on Mr. Coole's death they passed to the persons interested in reversion in the testatrix's real estate. The case for the reversioners was put on two grounds: first, election; and second, estoppel. Under the doctrine of election, where a testator gives a benefit out of his own property and purports to give property belonging to that beneficiary to another person, the beneficiary is put to his election, and if he elects against the will, that is to say, refuses to allow his property to be treated as passing by the will, the person disappointed by his decision to retain his own property is entitled to compensation out of the benefit which the testator has given out of his own property. In the present case, the two houses in question did not belong to Mr. Coole at the time of the testatrix's death, as he only acquired a title to them by the Statute of Limitations, which did not begin to run in his favour until after the death of his wife. Assuming that the houses are in terms included in the gift of "all other my real estate" after the death of Mrs. Coole, the fact that Mr. Coole had no title to the houses when his wife died is sufficient to prevent the operation of the doctrine of election: *In re Anderson.* (1)

(1) [1905] 2 Ch. 70.

The question of estoppel is somewhat more difficult. The general principle is that a person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will, or that he who has obtained possession under, and in furtherance of, the title of a devisor cannot say that such title is defective: *In re Anderson.* (1) In the present case, it is to be observed that Mr. Coole did not take any interest in these houses under his wife's will, nor did the will purport to give him any interest in them. Not only had she no power to dispose of them, but the only interest which he took in the real estate under the will was a life interest in his wife's real estate over which she had a disposing power. The will therefore did not purport to give Mr. Coole any interest in the houses in question. Nor is it by any means clear that the will purported to confer any benefit in the two houses on the remaindermen. This question depends upon the question whether the devise after Mr. Coole's death of all other the testatrix's real estate covered more than the real estate over which she had a disposing power given to Mr. Coole for his life. But assuming that the terms of the will did purport to confer upon Mr. Coole and the remaindermen interests in the houses in question, the case, in my opinion, is governed by the decision in *In re Anderson.* (1) In that case a testatrix who died in 1882 being entitled to some property at Litchurch over which she had a power of appointment by will, appointed this property to her husband for life with remainders over and being entitled to some property at Worksop, which in consequence of her marriage she could not dispose of by will, purported to devise it by a codicil to her husband with remainders over. After her death her husband took possession of the Worksop property and acquired a statutory title against his wife's heir at law. The question was whether he was estopped from saying, as against the remainderman, that his wife's testamentary disposition of the Worksop property was invalid. The learned judge drew a distinction between the case of a disposition validly executed by a person who had no title to the property

(1) [1905] 2 Ch. 70.

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July 13, 14.

In re LEEDS AND BATLEY BREWERIES, LIMITED, AND BRADBURY'S LEASE.

BRADBURY *v.* GRIMBLE AND COMPANY.

[1920. L. 537.]

Landlord and Tenant—Lease—Option to purchase Reversion—Exercisable before Determination of Lease—Tenant holding over—Option not a Term of resulting Yearly Tenancy.

An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy. It is a provision outside of the terms which regulate the relations between the landlord as landlord and the tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.

ADJOURNED SUMMONS.

The plaintiff had been the lessee of certain leasehold premises under a lease dated May 19, 1903, for a term of seven years from June 1, 1903. The lease contained a proviso that if the lessee should be desirous of purchasing the unexpired residue of the leasehold reversion, granted for a term of 999 years by a lease dated May 16, 1893, at the price of 3000*l.*, and should "at any time six calendar months before the determination of this lease" give to the lessors a written notice to that effect then in such case the person giving such notice should be the purchaser of the unexpired residue of the term at the price of 3000*l.*

In February, 1910, as the result of correspondence between the lessors and the plaintiff, the term created by the lease of May 19, 1903, was extended for twelve months from June 1, 1910, the correspondence operating (as his Lordship held) as if the lease had originally been created for eight years instead of seven, so as to make it determine on May 31, 1911. At the end of the extended time the plaintiff continued in possession, becoming a tenant on sufferance, and, after payment of rent, a tenant from year to year.

In 1919 the lessors contracted to sell the premises to the

defendants, and in November, 1919, the plaintiff, for the first time, gave the lessors notice of his intention to purchase the unexpired residue of the term of 999 years for 3600*l.*

This summons raised the question whether, in the circumstances, the option was subsisting and the plaintiff entitled to exercise it.

Hughes K.C. and *Church* for the plaintiffs. A lessee holding over becomes on payment and acceptance of rent a tenant from year to year, and the terms of the lease continue except so far as they are inconsistent with or inapplicable to a yearly tenancy: *Digby* v. *Atkinson* (1); *Mayor of Thetford* v. *Tyler* (2); *Hyatt* v. *Griffiths* (3); *Oakley* v. *Monck* (4); *Wyatt* v. *Cole* (5); *Dougal* v. *McCarthy* (6); *Morgan* v. *Harrison* (7); *Wedd* v. *Porter* (8); *Cole* v. *Kelly* (9); Foà's Landlord and Tenant, 4th ed., p. 396. The option to purchase in the present case was one of the terms of the lease which is applicable to and consistent with the yearly tenancy, and the six months' notice exercising the option can be given by the former lessee before the determination of his tenancy in any year. The option having been given only to the plaintiff and exercised by him before the conveyance of the reversion there can be no question of perpetuity or of the covenant running with the land, as in *Woodall* v. *Clifton.* (10)

Moreover the option to purchase, if not a term of the lease, which we do not admit, was at any rate a term of the contract under which the lease was granted and one of the factors which entered into that grant.

Cunliffe K.C. and *Devonshire* for the defendants. As a question of construction of the lease, the option is not exercisable after the determination of the lease. The notice has to be given "at any time six calendar months before the determination of this lease," and what is to be purchased is the unexpired residue of the term. Options of this kind must

(1) (1815) 4 Camp. 275, 278.
(2) (1845) 8 Q. B. 95.
(3) (1851) 17 Q. B. 505.
(4) (1866) L. R. 1 Ex. 159.
(5) (1877) 36 L. T. 613.
(6) [1893] 1 Q. B. 736, 741.
(7) [1907] 2 Ch. 137.
(8) [1916] 2 K. B. 91, 98.
(9) [1920] 2 K. B. 106.
(10) [1905] 2 Ch. 257.

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be construed strictly: *Lord Ranelagh* v. *Melton* (1); time is of the essence of the contract: *Dibbins* v. *Dibbins* (2); and the option must be exercised within the time limit. Moreover, as soon as the tenant has failed to exercise the option and the last six months of the term have commenced to run the option has gone for good, and it matters not that the tenant holds over at the end of the term, he cannot by so doing revive an option which expired six months before the term itself. Even if the subsequent agreement is to be taken as extending all the terms of the lease for one year, the option is gone before the yearly tenancy begins.

Further the option is not a condition of the tenancy at all. It is a separate contract, and is not an incident of the tenancy like rent or repairs: *Buckland* v. *Papillon.* (3) The applicant must bring himself within the terms of the condition: *Weeding* v. *Weeding* (4), and this option is not applicable to a yearly tenancy any more than is a covenant to build or pay outgoings: *Bowes* v. *Croll* (5); *Harris* v. *Hickman* (6); Woodfall's Landlord and Tenant, 19th ed., p. 256. Until exercised, an option is unilateral: *Weston* v. *Collins* (7); *Brooke* v. *Garrod* (8); Fry on Specific Performance, 4th ed., § 1103, and it does not regulate the relations as between landlord and tenant, and to attach it to a tenancy from year to year is to alter the terms of the condition and the position of the parties. A tenant has no power to enforce on a landlord an obligation which he never meant to accept: *Raffety* v. *Schofield.* (9)

Hughes K.C. in reply.

PETERSON J. stated the facts above set out and continued: The question is whether in these circumstances the option is subsisting and whether the plaintiff is entitled to exercise it. Various cases were cited: *Digby* v. *Atkinson* (10); *Hyatt* v. *Griffiths* (11); *Dougal* v. *McCarthy* (12); *Morgan* v. *Harrison* (13);

(1) (1864) 2 Dr. & Sm. 278.
(2) [1896] 2 Ch. 348.
(3) (1866) L. R. 2 Ch. 67, 70.
(4) (1861) 30 L. J. (Ch.) 680.
(5) (1856) 6 E. & B. 255, 264.
(6) [1904] 1 K. B. 13.
(7) (1865) 34 L. J. (Ch.) 353; 13 W. R. 510.
(8) (1857) 3 K. & J. 608.
(9) [1897] 1 Ch. 937.
(10) 4 Camp. 275.
(11) 17 Q. B. 506.
(12) [1893] 1 Q. B. 736.
(13) [1907] 2 Ch. 137.

and *Cole* v. *Kelly* (1), and the result of the cases is, I think, that the tenant who holds over with the consent of the landlord holds upon the terms of the tenancy created by the lease so far as they are applicable to a tenancy from year to year. But this does not mean that he has the benefit of all the provisions of the expired lease whether they were terms of the tenancy or not.

In the present case there was an option on the part of the lessee to purchase the reversion at any time six calendar months before May 31, 1911. That was a conditional offer by the landlord, or a contract for sale on performance of a condition, the condition being that six calendar months before May 31, 1911, the lessee should give notice in writing of his intention to purchase. Mr. Bradbury, however, contends that the landlord, by accepting the lessee as tenant from year to year, has entered into a contract under which the tenant is entitled to exercise the option in any year during which he is a tenant from year to year, if he gives notice of his intention to purchase not less than six months before the expiration of the year of tenancy, and that the option is exercisable as long as he remains a tenant from year to year, notwithstanding the possibility that in the course of time the property will very largely increase in value.

It is one thing for a landlord to give an option of purchase at a fixed price within a limited time like seven or eight years, but it is a very different thing to suppose that a landlord could have intended to have conferred upon a tenant a right to purchase at the original sum of 3000*l.* although the right may not be exercised for fifteen or twenty years. The real question is what are the terms of the tenancy under the lease which are applicable to a tenancy from year to year, or, in other words, what are the terms regulating the relations between the landlord as landlord and the tenant as tenant which are to be treated as incorporated in the tenancy from year to year? In my opinion an option to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy. It is a provision which is outside of the terms which

(1) [1920] 2 K. B. 106.

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regulate the relations between the landlord as landlord and the tenant as tenant.

In *Buckland* v. *Papillon* (1) an owner of a long term agreed to let the land for three years and also when called upon by the tenant to grant him a lease for three years, seven years or the whole term. There was no limitation placed upon the period within which the tenant could call upon the landlord to grant him the extended term. The tenant continued in occupation beyond the three years and became bankrupt. The assignee sold the bankrupt's interest to a purchaser and the question was whether the option of the tenant to take the lease had or had not gone at the end of the three years. The Lord Chancellor said: "It must be observed that there was no limitation whatever of the time within which Bloxam" (the tenant) "was to exercise his option. . . . . Undoubtedly, supposing that at the end of three years Bloxam had chosen to leave the place, that would have determined his option"; in other words, it was to be treated as the abandonment of his option, the option only being exercisable so long as he was in occupation of the premises—"but he continued in possession, and so became tenant from year to year, under the terms of the original agreement." Then the Lord Chancellor proceeds: "I do not mean to include in those words"—that is to say the terms of the original agreement—"the right to demand a lease, for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had done nothing whatever to preclude him from demanding that lease at any time." In other words the Lord Chancellor took the view that an option given in an agreement for a lease for three years to call upon the lessor to grant a lease for a longer period would not be one of the terms of the original agreement under which the tenant from year to year holds the premises after the determination of the original term. His view was that the option to have a longer term had nothing whatever to do with the tenancy from year to year. There is a similar observation in the case of

(1) L. R. 2 Ch. 67, 70.

Woodall v. *Clifton*. (1) In that case there was a lease of land for ninety-nine years which contained a proviso that in case the lessee, his heirs or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at the rate of 500*l*. per acre, the lessor, his heirs or assigns, on receipt of the purchase money, would execute a conveyance of the land in favour of the lessee, his heirs and assigns. Both the lease and the reversion were assigned. The assignee of the lease gave notice to the assignee of the reversion of his desire to exercise the option and brought an action against the assignee to compel conveyance of the land accordingly. Warrington J., as he then was, held that the option was invalid on the ground of remoteness. By the Court of Appeal, without determining the question of perpetuity, it was held that the proviso did not come within the statute 32 Hen. VIII, c. 34, so as to make the liability to perform it run with the reversion, and that consequently the action could not be maintained against the defendants, who were the assigns of the reversion. Romer L.J. in delivering the judgment of the Court said: "The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so." Then after some other observations which relate to the statute of Henry VIII., he says: "An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII. was dealing." In my opinion the option in this case is a matter that is wholly outside the relation of landlord and tenant, and therefore is not one of the

(1) [1905] 2 Ch. 257, 279.

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terms of the original tenancy on which the lessee held the property when he became tenant from year to year.

The result therefore is that this option is not now exercisable.

Solicitors: *Norris, Allens & Co., for Norris & Sons, Liverpool; Golding, Hargrove & Golding.*

R. M.

RUSSELL J. 1920 *June* 16, 17.

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[1920. P. 161.]

Company—Insurance—Winding Up—Policy mortgaged to Company—Curren at Winding Up—Ascertained Value—Action to redeem—Set-off—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 31.

A holder of a policy payable at the end of twenty-eight years borrowed money from the assurance company on his policy. Before the years expired an order was made to wind up the company, and the policy was valued under the Assurance Companies Act, 1909. The policy holder then, by leave of the Court, brought an action for redemption against the company, claiming to set-off the value of the policy against his debt:—

Held, that s. 31 of the Bankruptcy Act, 1914, did not apply and no set off could be allowed.

Ex parte Price (1875) L. R. 10 Ch. 648 followed, but with reluctance.

G. R. PADDY owned freehold hereditaments in fee simple. On June 1, 1906, he took out a policy of assurance with an insurance company for 400*l.*, to be paid at the end of twenty-eight years, and if the assured died before that time the premiums to be returned to his representative. By an indenture of October 19, 1907, he conveyed the hereditaments by way of mortgage to the company to secure 320*l.* and interest and charged the policy by way of collateral security, and it was provided that, if any moneys became payable by the company under the policy by its remaining in existence for twenty-eight years, such moneys should be applied by the company in discharge of moneys due to the company under the mortgage, the balance being paid to the mortgagor.

On October 23, 1907, by an indenture of sub-mortgage, supplemental to the mortgage, the company assigned to Maria Clutton the sum of 320*l.* then due under the mortgage and interest to become due, with the benefit of all rights under the mortgage, and conveyed and assigned to M. Clutton the hereditaments and the benefit of the charge on the policy, with proviso for redemption. In 1909 the business and assets of the company were taken over by the National Standard Life Assurance Corporation (herein called the corporation). On May 25, 1916, M. Clutton died. On June 6, 1916, an order was made for winding up the corporation. Its assets were insufficient for payment of its debts in full. On June 29, 1916, the executors of M. Clutton gave Paddy notice of the sub-mortgage, and thereafter Paddy paid the interest under the mortgage to them. On January 17, 1920, Paddy, desiring to redeem the property, tendered to the executors 200*l.* 8*s.*, being 325*l.* 12*s.* due on the mortgage for principal and interest, less 125*l.* 4*s.*, at which sum the policy or the corporation's liability thereunder had been valued in the winding up, under the Assurance Companies Act, 1909. (1) The tender was refused, because of the claim to

(1) Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 17: "(1.) Where an assurance company is being wound up . . . . the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilties of that class provided by the Sixth Schedule to this Act. (2.) The rules in the Sixth and Seventh Schedule to this Act shall be of the same force, and may be repealed, altered, or amended, as if they were rules made in pursuance of section two hundred and thirty-eight of the Companies(Consolidation) Act, 1908, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of insurance companies." The Seventh Schedule provides that where an assurance company is being wound up by the Court or under the supervision of the Court, the liquidator, in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, is to ascertain the value of the liability of the company to each such person, and give notice of such value to such persons in such manner as the Court may direct, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the Court. The Sixth Schedule prescribes the mode of valuation. Sect. 238 of the Companies (Con-

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deduct 125*l.* 4*s.* Paddy then, having obtained the leave of the Court, commenced this action against the executors and the corporation, for a declaration that he was entitled to set-off the 125*l.* 4*s.* against the amount due under the mortgage, and for redemption.

Farwell for the plaintiff. Except for one authority, the current of modern decisions is that undoubtedly the plaintiff has the right he claims. It must be a claim for "money or money's worth." It is that. The corporation's contingent liability to pay him a sum at the end of twenty-eight years crystallised at the presentation of the petition to wind up into a present liability to pay him the amount at which the liability on the policy is valued. The mortgagee cannot, by the sub-mortgage, prejudice the plaintiff. The sub-mortgagee has no higher right than her assignor. The Judicature Act, 1875, s. 10, first made provisions as to debts provable in bankruptcy applicable to insolvent companies' winding up, after November 1, 1875. It imported into the winding up of companies the rules as to set off in bankruptcy: *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) The presentation of a petition is equivalent to an act of bankruptcy. The value set upon a policy in a winding up is a debt provable within s. 30 of the Bankruptcy Act, 1914.

[RUSSELL J. Or, rather, within the mutual credits section—s. 31.]

A debt which can be proved in a winding up under s. 30 can be set off under s. 31: *Lee and Chapman's Case* (2), per Brett M.R. That case is in the plaintiff's favour as against the defendant corporation. If he cannot succeed against the defendant corporation, it is useless to proceed against the sub-mortgagees. It is not necessary that his claim should be anything in the nature of a legal debt, it is sufficient if it is anything provable under s. 30. The "widest possible scope" is to be given to the mutual credits section; and where there is a money claim on each

solidation) Act, 1908, enables rules of procedure to be made.

(1) (1884) 9 App. Cas. 434, 437.
(2) (1885) 30 Ch. D. 216, 222.

side there can be set off: *Eberle's Hotels Co.* v. *Jonas* (1), per Lord Esher M.R. Though nothing was due at the date of the winding up, yet, as something would become due during the winding up, that something could be set off: *In re Daintrey* (2), per Bigham J. The only authority against the plaintiff is *Ex parte Price.* (3) The Court is not asked to say it is wrong but that it is distinguishable. *Sovereign Life Assurance Co.* v. *Dodd* (4), which is referred to by Wright J. in *In re Daintrey* (5), cannot easily be reconciled with *Ex parte Price.* (3) So far as *Sovereign Life Assurance Co.* v. *Dodd* (4) is a decision that there was a right of set-off in bankruptcy, it is in the plaintiff's favour.

[RUSSELL J. How is *Ex parte Price* (3) distinguishable from the present case?]

There James L.J. thought it important that neither under the winding up nor in the bankruptcy was there any set-off. The corporation has in its hands the policy which is part of the mortgage property. The plaintiff only asks to substitute a present right to a smaller amount for a right to a larger amount which the corporation was liable to pay on a contingency. He admits that he claims as a creditor.

[RUSSELL J. *Ex parte Price* (3) is the only case in the plaintiff's way, but it is like this case and is the only case of a policy not matured.]

It is inconsistent with *In re Daintrey* (6) and *Lee and Chapman's Case.* (7) It does not cover this case. There was nothing in it of the nature of an action at all. Also at that time there was no provision for the valuation of policies.

[RUSSELL J. Was there not power, given by the private Act there, for the arbitrator to value?]

There was no provision as in the Assurance Companies Act, 1909, giving definite fixed values.

[RUSSELL J. That Act gives a particular mode by which the measure of damages may be ascertained.]

(1) (1887) 18 Q. B. D. 459, 465.
(2) [1900] 1 Q. B. 546, 569.
(3) L. R. 10 Ch. 648.
(4) [1892] 1 Q. B. 405. Affd. [1892] 2 Q. B. 573.
(5) [1900] 1 Q. B. 562.
(6) [1900] 1 Q. B. 546.
(7) 30 Ch. D. 216.

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A value is put on a policy under the Act of 1909, but there is no necessity for the policy-holder to prove. It must be admitted that the distinctions between *Ex parte Price* (1) and this case are not very obvious, but the Court can say that *Ex parte Price* (1) is not so exactly identical with this case that it will follow it.

Assuming the plaintiff's contention to be maintainable so far, he has also a right of set-off against the sub-mortgagee. A sub-mortgage is an "absolute assignment" within s. 25, sub-s. 6, of the Judicature Act, 1873: *Hughes* v. *Pump House Hotel Co.* (2) Having a right of set-off against an assignor, the plaintiff has the right against the assignee: *Roxburghe* v. *Cox* (3); *Newfoundland Government* v. *Newfoundland Ry. Co.* (4); *Parsons* v. *Sovereign Bank of Canada.* (5) In the present case notice of the sub-mortgage was not given till after the winding-up order was made. Thus the right of set-off arose before notice given. That is sufficient to distinguish this case from *Lee & Chapman's Case.* (6) *Christie* v. *Taunton, Delmard, Lane & Co.* (7) is very like this case.

The 125*l.* 4*s.* is either damages for breach by the defendant corporation of its obligation on the policy or the substitution of a present debt for a future liability. The plaintiff's right against the mortgagee accrued on the winding up and can be enforced against the mortgagee. This case is not covered by *Ex parte Price* (1), but is brought within *Sovereign Life Assurance Co.* v. *Dodd.* (8) If an action had been brought against the plaintiff by the corporation for foreclosure at common law no doubt he could set off this 125*l.* 4*s.* against the corporation's claim; and there is no difference because he is plaintiff instead of defendant.

[RUSSELL J. The real question is the state of account between the parties in administration. The Court ought not to be hampered by matter of form.]

The plaintiff's right depends not upon its assertion but

(1) L. R. 10 Ch. 648.
(2) [1902] 2 K. B. 190.
(3) (1881) 17 Ch. D. 520.
(4) (1888) 13 App. Cas. 199.
(5) [1913] A. C. 160.
(6) 30 Ch. D. 216.
(7) [1893] 2 Ch. 175.
(8) [1892] 2 Q. B. 573.

upon its accrual. That distinguishes this case from *Ex parte Price* (1) and brings it within *Sovereign Life Assurance Co.* v. *Dodd.* (2) *Ex parte Price* (1) is distinguishable because it was not an action but was in bankruptcy.

D. D. Robertson for the corporation. This defendant is willing to submit to any order the Court thinks fit to make, having no interest in the question beyond costs.

Crossman for the sub-mortgagee's executors. The plaintiff has no right of set-off even against the corporation, the mortgagee; certainly none against these defendants, the assignees. As against the corporation, this is a case of a policy current at the crucial date and the claim of the holder of a current policy cannot be set off against a debt due to the corporation. *Sovereign Life Assurance Co.* v. *Dodd* (2) has nothing to do with this case, because it was the case of a matured policy. The plaintiff has no right of set-off, legal or equitable. There must, for set-off, be two debts. Where a policy is current, there is no debt in respect of it. The corporation having gone into liquidation, an action cannot be brought against it, and all that the plaintiff has is a statutory right under s. 31 of the Bankruptcy Act, 1914. *Ex parte Price* (1) exactly covers this case. It was a case in a bankruptcy, not in a winding up. If it had been in a winding up it would not apply, because at that time the rules in bankruptcy had not been made applicable to winding up. The arguments advanced there were the same as are advanced here. The plaintiff is not claiming damages but a statutory amount, which is a sum arrived at by virtue of the mutual credits section (s. 31) or the debts provable section (s. 30)—i.e., he is driven to the bankruptcy provisions to get a value at all. Policies have always been dealt with in a special way of their own. *Ex parte Price* (1) is no authority in respect of anything but a policy, but in respect of a policy it is difficult to see how, on precisely similar facts as here, it is to be got out of.

[RUSSELL J. Has it ever been doubted?]

Text books have suggested doubts: Palmer's Company Precedents, 11th ed., Part II., p. 528; Stiebel's Company Law

(1) L.R. 10 Ch. 648. (2) [1892] 2 Q.B. 573.

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and Precedents, p. 1237; Halsbury's Laws of England, vol. ii., p. 212. On the other hand Buckley on Companies Acts, 9th ed., p. 467; Williams on Bankruptcy, 11th ed., p. 165; and Lindley on Companies refer to it without a suggestion that it is wrong. It is ultimately a question what on taking an account between these defendants and the plaintiff is to be allowed.

[He was stopped.]

RUSSELL J., after stating the facts and saying that at the date of the winding up the policy had not matured or become a claim, and, the value of the policy or the liability under it having since been ascertained and not disputed, the plaintiff was bound by the valuation and had become a creditor of the corporation for 125*l.* 4*s.* The plaintiff's claim arises by virtue of the provisions of the Bankruptcy Act, 1914 (1),

(1) Bankruptcy Act, 1914, s. 30: "(1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy." "(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." Sub-s. 4: "An estimate shall be made . . . . of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value." Sub-s. 8 defines "liability" as including "(*b*) any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor; (*c*) generally, any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of, money or money's worth; whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion."

Sect. 31: "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance

which by s. 207 of the Companies (Consolidation) Act, 1908, are made applicable to the winding up of an insolvent company. [His Lordship read s. 30, sub-ss. 1 and 3.] So in this case the liability of the corporation, being a liability future or contingent, is to be deemed to be a debt provable in the winding up. [His Lordship read sub-ss. 4 and 8 (*b*) (*c*).] By having resort to those provisions the 125*l*. 4*s*., the value of the corporation's liability, is arrived at and admitted. Then s. 31 provides for cases of mutual credit and set-off, so as to prevent, where something is due on either side, one party from receiving his amount in full without giving credit to the other. [His Lordship read s. 31 to "respectively."] It is under that section that the plaintiff claims. He says that under that he is entitled to set off his claim against the corporation's claim against him. Mr. Farwell contended also, on his behalf, that, apart from bankruptcy, he had a common law right to do this. As to that I do not agree with him. In my opinion, his right (if any) of set-off arises only under the administration in bankruptcy. It is well settled that at common law set-off can only be made available as a plea in bar. Supposing the plaintiff had been sued for his mortgage debt, he could not have set off the 125*l*. 4*s*., he would have had only the right to counter-claim for it, and could get nothing in respect of it till it should be ascertained in the action what the respective rights were. Till then he would have no right of set-off.

Whether the plaintiff has any right of set-off in the winding up against the defendant corporation would be a difficult question to answer, having regard to the state of the authorities, in the absence of any decision expressly covering the case. Mr. Farwell referred me to the later authorities first, before he fully dealt with an earlier one which was apparently against his contention. I will refer first to *Lee & Chapman's Case*. (1) There, by the terms of a contract between the Commissioners of Sewers and a wood-paving company, the company were to pave a street called "Queen Victoria Street," and

of the account, and no more, shall be claimed or paid on either side respectively. . . . ."

(1) 30 Ch. D. 216.

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the Commissioners were to pay 60 per cent. of the moneys due a month after the engineer certified the works to be complete; 30 per cent. within three months afterwards; and 10 per cent. at the expiration of two years. During the two years the company were to keep the wood surface of the roadway in repair, and if, before the expiration of the two years, the Commissioners should give them notice, the company were also to keep the roadway in repair for fifteen years upon being paid for the same at the annual rate of 6*d.* per square yard. The Commissioners were to be at liberty to retain from time to time, "out of any money payable by them to the contractors," an amount equal to the above annual charge, by way of security; and in the event of failure by the company to perform the contract, the moneys retained were to be forfeited, and to be held by the Commissioners as liquidated damages for the default. The contract being dated on September 22, 1882, the company, on November 15, 1882, gave to Lee & Chapman, timber merchants, a charge on all their interest in the contract to secure a debt for goods sold and delivered; and on December 9, 1882, notice of the charge was given to the Commissioners. On the same December 9, but after the notice, the company presented a petition for a winding-up order. On January 13, 1883, the winding-up order was made; on January 29 the liquidator, having completed the work, sent in a claim to the Commissioners, and on March 8 the engineer certified the work to be complete. On March 19, the Commissioners sent to the liquidator a claim of set-off for anticipated loss by breach of the contract to repair for fifteen years, the amount of such claim being estimated by the difference between 1*s.* a square yard, which the Commissioners considered they would have to pay for the repairs, and the 6*d.* a square yard provided for by the agreement. The claim could not arise unless notice to do the repairs was given by the Commissioners to the company, and no notice had been given. The Commissioners also claimed to set off damages accrued and anticipated under other contracts for paving other streets. Except as to a trifling sum, it was not alleged that any cause of action for breach of

any of these contracts accrued before January 27, 1883. On May 25, 1883, the Commissioners for the first time served the company (in liquidation) with formal notice to repair for fifteen years from March 8, 1885. One question was whether under s. 39 of the Bankruptcy Act, 1869, any right to retain and set off moneys due under one contract existed in respect of moneys due under other contracts. It was held that there was not that right. It was held, further, that Lee & Chapman were entitled to a charge on 90 per cent. of the moneys payable under the contract undiminished by any retainer or set-off by the Commissioners either under the Queen Victoria Street contract or otherwise. So, as against the mortgagees, Lee & Chapman, the Commissioners had no right to set off. Brett M.R., after dealing with the question whether the Queen Victoria Street contract carried with it any right to deduct and set-off moneys which might become due upon other contracts, said (1): "A further point is raised. The Commissioners and the company in liquidation had a contract with reference to Queen Victoria Street. The contract gave certain rights to the Commissioners, and it gave certain rights to the company. The company were to make the street and of course were to be paid in respect of making that street; but the company undertook certain liabilities, namely, that after the street should be finished, they would, if so requested, within two years, or in other words if notice were given to them within that period, keep the roadway in repair for fifteen years. That was the existing contract. The company had begun to make the street when they went into liquidation, but they had not so far finished making the street, as I understand it, as to entitle themselves to payment for their work: they had done a great part of the work, but in order to enable them to obtain the payment under the contract the time had not yet come. Before they went into liquidation—it signifies not how long—they had given a charge to Lee & Chapman on their interest in that contract. What was their interest in that contract?

(1) 30 Ch. D. 220, 223.

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It was the money that was to come to them under that contract. Therefore they gave a charge upon that interest. Notice of that charge was given to the Commissioners before the liquidation, although the liquidation took place upon the same day. When the company went into liquidation, the liquidator evidently thought it for the benefit of the estate that he should complete the contract, so as to obtain the payment for it. He got the leave of the Court to carry on the contract. It has been argued that the company which carries on the contract, is not the same company as that which entered into the contract. Be it so: but the contract remained the same; and if the company were to carry on the contract so as to earn the money, it is obvious to my mind that they were to carry it on subject also to the liability that if they were requested so to do they were to keep the road in repair for fifteen years. But they are disabled from performing a part of the contract, and that gives a right to the person with whom they have contracted to damages under that contract. Those damages are to be assessed when the breach is complete, and the moment when they are finally unable to carry out their part of the contract so that by no means could they reinstate themselves into the power of carrying it on, at that moment the right to damages has accrued and the damages which have then accrued ought to be assessed." Then later, after discussing the question of assessment of damages, he continues: "The liquidator sues the Commissioners for the price of the work done under the contract. The Commissioners allege that they have a claim against the liquidator for damages which have been assessed, and as against him, by virtue of the Bankruptcy Act, 1869, s. 39, those damages are to be considered as damages which can be set off by the Commissioners against his claim." The question there turned upon the provisions of the Bankruptcy Act, 1869, but it is admitted in this case that there is no difference for the present purpose between the provisions of that Act and those of the present Bankruptcy Act of 1914, as to mutual credits. "If there were no charge upon the claim of the company, it seems to me clear upon authority

and upon the true construction of this section that the damages could be set off. But then a charge has been given to Lee & Chapman before the winding up. These damages for breach of contract until they were assessed were unliquidated. If there had been no winding up, could they have been set off as a claim by the Commissioners against the company? Certainly not. They are not damages which can be set off under the contract. Then if they cannot be set off under the contract, the interest of the company is to have the payment for the work done not subject to this right of set-off. That is an interest on which they have given a charge to Lee & Chapman. Then how can Lee & Chapman's right which had thus been constituted before the winding up, be altered by the winding up? It seems to me that it cannot, that when Lee & Chapman's rights are considered, the Bankruptcy Act, 1869, s. 39, does not apply." Then later, "But the moment that I come to consider the rights as between the Commissioners and the liquidator, and to consider them as if no charge had been made, I am driven back on what I have said before. As between them this claim to damages can be proved in the winding up. The moment I come to that conclusion, I must hold that the Bankruptcy Act, 1869, s. 39, applies, and that the claim of the Commissioners is to be treated by way of set-off, and they are entitled to say that they cannot be called upon to pay more than the amount which they owed the company diminished by that which the liquidator owed them for these damages." So the Master of the Rolls held that as between the Commissioners and the liquidator the Commissioners' claim for damages could be set off. Cotton L.J. said: "Then I come to this other point. The company is being wound up. Is there a right of set-off under the mutual credit clause, either as against the company or as against the assignees, Lee & Chapman, and is the company entitled to recover the 740*l.* 15*s.* 7*d.* expended by the liquidator upon the street? Now as regards the company, that is to say as against the liquidator, in my opinion there is the right of set-off under s. 39 of the Act of 1869 which is claimed by the appellants. That section says that 'where

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there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings.' All that applies now to proceedings in winding up companies, and under the 31st section of the Bankruptcy Act, 1869, claims for damages could be proved. The learned counsel for the liquidator have said that under the contract there was a right on the part of the company to receive from the Commissioners a considerable sum of money, 2587*l.* 5*s.* 4*d.* But what the Commissioners say is that the contract which gives the liquidator a right to that money contains a clause that the company shall, if it receives a notice within two years, maintain Queen Victoria Street for fifteen years, and that is now rendered impossible for the company to do, because the company has gone into liquidation, and the amount which the Commissioners can properly claim by way of damages under the breach of that clause has been estimated. Of course that breach has not actually occurred, but the company has put itself in such a position that it cannot possibly perform the contract, and the Commissioners are entitled to prove, although the notice had not been given at the date of the liquidation or at the date of the completion of the work by the liquidator; in my opinion there is a claim for damages capable, as the Vice-Chancellor thought, of being proved in the winding up. The question is, whether it does not come under that mutual credit clause, s. 39. In my opinion it does: mutual dealings in respect of which there are these cross claims are capable of being proved in the liquidation as well as the other claim which the liquidator has as against the Commissioners. And why should it not be? It is argued that this is not a liability at the time because there was no breach. At the time when the company commenced its liquidation, it was under a contract which implied a liability to maintain these streets if it were required. It is now rendered impossible by the winding up for the company to do that, and in my opinion, though no notice had been given

before the commencement of the winding up, that is properly a liability the damages for which are capable of being proved, and, if capable of being proved, are capable under the mutual credit clause of being set off against any claim by the liquidator as against the Commissioners." So far, *Lee & Chapman's Case* (1) shows that in order to be able to set off it is not necessary that the claim should be a legal debt but it is sufficient if the claim which it is sought to set off is a right which could be proved in the winding up. *In re Daintrey* (2) was again a decision of the Court of Appeal. There D., a solicitor, being at the time indebted to M., another solicitor, in a sum of 86*l.*, on December 24, 1892, committed an act of bankruptcy of which M. had no notice. On December 31, 1892, D. sold his business to M. under an agreement which fixed as the price a portion of the profits expected to be earned for three years from the business sold. Thereupon M. took possession of and carried on the business. On January 17, 1893, a receiving order was made against D., but no profits had then been earned from the business. At the end of the three years a sum of 300*l.* was found to be due from M. to D. under the agreement as the price of the business, and this sum was paid to D.'s trustee in bankruptcy after deducting the 86*l.* due from D. to M. The trustee however objected that M. could not set off the 86*l.* against the 300*l.*; that he must pay the 300*l.* in full and be satisfied with a dividend on the debt of 86*l.* The case was tried in the county court where the objection was allowed and it was held that there was no right of set-off. An appeal by M. to the Divisional Court consisting of Wright and Bigham JJ. was dismissed, the Court differing in opinion. The case then went to the Court of Appeal which agreed with Bigham J. that the dealings between M. and D. were "mutual dealings" within s. 38 of the Bankruptcy Act, 1883—there is no difference for this purpose between that Act and the Act which I am now considering—and that M. was therefore entitled to set off the 86*l.* due to him from D. against the 300*l.* due from him to D.; also that the date of the receiving order, and not that of the act of bankruptcy, was the proper date at

(1) 30 Ch. D. 216. (2) [1900] 1 Q. B. 546, 572, 573.

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which to ascertain what those dealings were, so as to be capable of being made the subject of set-off under the section. I do not read the long judgment of Wright J. and only mention it to say that he does refer to *Ex parte Price* (1) which I shall have occasion to come to later. Bigham J. held that there could be set-off. In the Court of Appeal Lindley L.J. said: "I do not think we shall gain anything by taking time to consider this case or hearing a reply. I cannot help thinking that there is an error in the judgment of Wright J., and that the view taken by Bigham J. is correct. I agree with that part of Wright J.'s judgment in which, after an examination of the authorities, he came to the conclusion that the date of the receiving order, and not the date of the commencement of the bankruptcy, was the time for ascertaining what mutual debts, credits, and dealings were existing between the debtor and other persons. But I cannot follow him in his second step—that there were at that date no mutual debts, credits, or dealings between Daintrey and Messrs. Mant & Mant. The case stands in this way. Daintrey owes Messrs. Mant 86*l*. On the other hand, Messrs. Mant have become liable under the document described as 'Heads of Agreement,' and which is dated December 31, 1892, to pay Daintrey various sums, amounting altogether to about 300*l*., under certain conditions, and whatever is payable to Daintrey by them is payable under this document. Looking at this agreement, I fail to see that at the date of the receiving order there was nothing payable under the agreement. Under the circumstances it is clear that when this agreement was executed very considerable sums would become payable under it. Then there was this debt due from Daintrey to Messrs. Mant before the bankruptcy, and which would have become payable by Daintrey if there had been no bankruptcy. Why it should not be set off against the debt due to him by Messrs. Mant, notwithstanding the bankruptcy, I cannot understand. How can the trustee insist on having 20*s*. in the pound from Messrs. Mant, and say that Messrs. Mant must be content with a dividend on the debt due to them from Daintrey? Such a contention is, in my opinion,

(1) L. R. 10 Ch. 648.

unarguable. It is to remedy such an injustice that the provisions of the old bankruptcy law have been recast, and the point has been dealt with by the mutual credit provisions in s. 38 of the Bankruptcy Act, 1883. It appears to me to be quite true that when the trustee makes a claim against a person, the bankruptcy proceedings to ascertain a claim do not apply. The machinery of the Act deals with the case of a claim against 'the estate.' Looking at the mutual credit clause in the Bankruptcy Act, it is quite obvious that, inasmuch as there is no machinery for ascertaining what amount Messrs. Mant have to pay, the operation of the clause cannot be excluded. I cannot help thinking that Wright J. was in error in the construction he put on this agreement. He thought that Messrs. Mant were under no obligation towards Daintrey. I agree that Messrs. Mant were not bound to do business for all the clients of Daintrey, and above all that no client of Daintrey's was bound to do business with them; but that Messrs. Mant were bound in certain conditions to pay this money to Daintrey is clear. I think the view of Bigham J. is right, and that this is a case in which s. 38 applies." Sir F. H. Jeune P. agreed. Romer L.J. said: "I agree with Wright J. that the date of the receiving order is the proper date to look at for the purpose of seeing whether there were mutual dealings between Daintrey and Messrs. Mant upon which this agreement was made, and whether those mutual dealings gave rise to any right of set-off. There was a certain sum due from Daintrey to Messrs. Mant. On the other hand, Messrs. Mant were under a liability to Daintrey by virtue of the agreement of December 31, 1892. I agree that the amount which ultimately became payable by them could not be ascertained until some time later than the date of the receiving order, and it was possible that the amount might be very small; but, whatever sum eventually became payable, became payable to Daintrey by virtue of this agreement of December 31, 1892, and of nothing else. For Messrs. Mant to obtain the advantage of the mutual credit clause, it was not necessary that the money payable under the agreement should be immediately payable to the bankrupt

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at the date of the receiving order; nor were the circumstances such that the account could be taken as between Messrs. Mant and the bankrupt at that date. It is quite sufficient if the account can be taken when the set-off arises." That case is not consistent with the view that there must be a legal debt at the date of the bankruptcy.

I will now come to *Ex parte Price*. (1) It is really just like the present case. I pass by *Sovereign Life Assurance Co.* v. *Dodd* (2) where the Court was dealing with a policy which had matured at the crucial date. *Ex parte Price* (1) is just like the present case. It dealt with a policy which was current at the crucial date. It was like the present case also in this, that the person claiming to set off was claiming in respect of a mortgage transaction. It was a case before James and Mellish L.JJ. It has never, so far as I know, been questioned in any reported case. It has been cited without adverse comment by many text-writers, though one or two suggest that it might not be followed.. In *Sovereign Life Assurance Co.* v. *Dodd* (2) it was carefully considered by Lord Esher M.R. and Bowen and Kay L.JJ.; and Kay L.J., having explained how it was distinguishable from the case the Court was dealing with, said (3): "I do not in any way desire to dissent from the decision in *Ex parte Price* (1), but it is distinguishable." In *Ex parte Price* (1) Dr. Edwin Lankester was the holder of four policies of assurance on his own life in the English Widows' Fund, which was amalgamated with the European Life Assurance Society, for sums amounting altogether to 1049*l*. In November, 1865, he borrowed 140*l*. from the European Society, after the amalgamation, on the security of the policies. He thus became debtor to the Assurance Society, which held as security the policies on his life. On January 12, 1872, the two companies were ordered to be wound up, and their affairs were afterwards referred to arbitration under a private Act (the European Assurance Society Arbitration Act, 1872 (35 & 36 Vict. c. cxlv.)), and official liquidators were appointed by the arbitrator. By clause 6 of the private Act the arbitrator had power to value and estimate any liabilities or claims,

(1) L. R. 10 Ch. 648. (2) [1892] 2 Q. B. 573. (3) [1892] 2 Q. B. 585.

whether present, future, liquidated, contingent, or otherwise, and "liability" as defined by clause 2, of the Act included "policy . . . . and any liability, present, future, liquidated, contingent, or other, on or in respect of a policy." Under that Dr. Lankester's policies were valued at 446*l.* 8*s.*, and dividends amounting to 66*l.* 19*s.* had been declared on this sum, being at the rate of 3*s.* in the pound. So Dr. Lankester would receive only 66*l.* 19*s.* On March 28, 1872, Dr. Lankester filed a petition for liquidation, and on May 1 his creditors agreed to accept a composition, and a trustee was appointed. Dr. Lankester died in 1874 and his estate was insolvent and expected to pay 10*s.* in the pound. The official liquidators sought to prove against his estate under the composition for 140*l.* and interest, but the trustee claimed a right to set off against the demand the sum of 446*l.* 8*s.*, at which the policies had been valued, and to prove for the balance against the estate of the European Society under the arbitration. The Registrar allowed the set-off, and the official liquidators appealed from that decision. The arguments are of interest. For the appellants it was contended that there was no right of set-off in the trustee; that at the commencement of the winding up there was no debt due from the company, and it was possible no debt would ever become due, for the company's liability was contingent on the policies being kept up; that, if the company had been solvent when Dr. Lankester filed his petition, it was clear there would have been no set-off against the company, and the winding up made no difference; and that there had been no mutual dealing. For the trustee it was argued that the fact of the company being wound up made all the difference; that it might be that before the winding up there was no debt due on the policies, but they had now been valued under s. 158 of the Companies Act, 1862, and, that being done, the amount constituted a debt which could be proved against the company, and if it was a debt capable of being proved it must be a debt capable of being set off against any proof by them, citing *In re Duckworth* (1); and that the case was within the mutual

(1) (1867) L. R. 2 Ch. 578.

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credits clause. The argument for the trustee is exactly reproduced in Mr. Farwell's argument for the plaintiff here—that, though no debt was in existence at the crucial date, yet the liability has been now valued, and he could prove for the amount of the valuation under s. 30 of the Act and, if so, he could set it off under s. 31. The Court of Appeal in *Ex parte Price* (1) held there could be no set-off allowed. James L.J. said: "I am of opinion in this case that the official liquidators under the winding up are clearly entitled to prove for the debt simpliciter against the estate of Dr. Lankester. There is no right of set-off under the Companies Act"—that was true at that time—"except that of the common law right of set-off, which would be allowed in an ordinary action at law. That being so, according to my view there is no set-off against the claim of Dr. Lankester's trustee under the winding up in favour of the liquidators. Nor, on the other hand, is the trustee entitled to a set-off in bankruptcy against the claim of the liquidators." He is not saying there is no set-off at all but he is contrasting the two cases. "The mutual credit clause in the Bankruptcy Act, 1869, enlarged by these words, 'mutual dealings,' still requires that there must be something of an account to be taken of what is due upon the one side and what is due upon the other"—i.e., there must be something of a nature on which an account can be taken. "In that sense there never was anything due from the insurance company in which an account could be taken. It is impossible to say what was due upon the policy when the winding up commenced, any more than that on a subsequent occasion some valuation had been put upon the policy, and that a dividend had been ordered to be paid upon it under the winding up." That is exactly applicable to the present case. "But that cannot make it a thing which was due by reason of mutual dealings and transactions between the parties, and you can by no possible construction of the clause bring this in as a debt due on the one side to be set off against a debt due on the other. It is simply that each party will prove for what he can." The judgment

(1) L. R. 10 Ch. 648, 650.

of Mellish L.J. is to the same effect. He says: "I am of the same opinion. It is quite clear that if it had been a solvent company that had lent money to the bankrupt, and the company had never stopped or been wound up, and the company had come to prove for the debt due, the trustee never could have claimed a set-off. There would have been no cause of action, and no proof at all. It does not, in my opinion, make any difference that the company is being wound up. It appears to me that that fact does not bring it within the 'mutual credit' clause. I apprehend that the value of the policies is not a sum due at all, but is a sum which is arrived at under the winding up for the purpose of regulating the proof of debts. But it never was a debt, nor is it a sum which ever, in the proper sense of the word, would become payable as for money due under the mutual credit clause; and I think, therefore, that the liquidators are entitled to prove for the full amount." That case was a decision of the Court of Appeal. It is a case which has caused difficulty in more ways than one, and it may not be possible to justify, in view of later decisions, all that is there said. But it is a decision which is exactly in point. There it was decided that, when a policy-holder in a life assurance company had borrowed money from the company on his policy, and before the death of the assured the company was wound up and an estimated value put upon the policy, and afterwards the policy-holder filed a petition for liquidation, the trustee in his bankruptcy was not entitled to set off the value as ascertained of the policy against the amount advanced by the company. Much as I should like to be bold enough not to follow *Ex parte Price* (1), I feel bound to follow it. It has never been adversely commented on judicially. I must hold that the plaintiff has not any right of set-off as against the defendant corporation, and the same result follows as against the defendant corporation's assignee, the sub-mortgagee.

Solicitors: *Henry Anderson; Stow, Preston & Lyttelton, for Clutton & Moore, Bristol; Close & Co.*

(1) L. R. 10 Ch. 648, 650.

A. L.

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1920

June 11, 14, 21.

KEEN *v.* MEAR.

[1919. K. 262.]

Vendor and Purchaser — Estate Agent's Authority — Contract by Agent of Partner — Liability of other Partner — Specific Performance — Damages — Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 5 — *Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

The mere employment of an estate agent by an owner to dispose of a house confers no authority to make a contract; the agent is solely employed to find some one to negotiate with the owner; but, if the agent is definitely instructed to sell at a certain price, those instructions involve authority to make a binding contract and to sign an agreement.

Hamer v. *Sharp* (1874) L. R. 19 Eq. 108; *Wilde* v. *Watson* (1878) 1 L. R. Ir. 402; *Chadburn* v. *Moore* (1892) 61 L. J. (Ch.) 674; *Rosenbaum* v. *Belson* [1900] 2 Ch. 267; *Thuman* v. *Best* [1907] W. N. 170 applied.

But the authority is limited to signing an open contract and does not authorize the agent to sign a contract with special conditions—e.g., as to title with which it is no part of an estate agent's duty to deal.

Sect. 5 of the Partnership Act, 1890—which enacts that "every partner is an agent of . . . . his other partners for the purpose of the business . . . . and the acts of every partner . . . . for carrying on in the usual way business of the kind carried on by the firm . . . . bind . . . . his partners, unless the partner . . . . acting has . . . . no authority . . . . in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner"—does not override s. 4 of the Statute of Frauds.

C. an estate agent, described as "agent for S. C. Mear (hereinafter called the vendor)," signed a contract as "agent for vendor" to sell a house to the plaintiff for 515*l.*, containing provisions for payment of deposit, for completion on a particular day, and for "a good and sufficient title to be given." S. C. Mear had instructed C. to sell for 515*l.* and on hearing of the contract ratified it. The house belonged to S. C. Mear and W. W. Mear jointly as partners. S. C. Mear acted bona fide, but it was not proved that by the practice of the partnership S. C. Mear had authority to sell, and W. W. Mear on hearing of the contract repudiated it. In an action against S. C. Mear and W. W. Mear for specific performance:—

Held, as against S. C. Mear, that C. had authority to sign an open contract on his behalf but not the particular contract entered into, it being no part of an estate agent's duty to deal with title, but that S. C. Mear, having ratified the particular contract, was liable for breach of it, and the plaintiff was entitled to a return of, and interest on, the deposit, costs of investigation of title, and insurance paid, but not to damages for loss of bargain—following *Flureau* v. *Thornhill* (1776) 2 W. Bl. 1078; *Bain* v. *Fothergill* (1874) L. R. 7 H. L. 158, and

distinguishing *In re Daniel* [1917] 2 Ch. 405—nor to any costs of litigation as damages or any interest in respect of balance of purchase money placed on deposit.

Held, as against W. W. Mear, that, assuming the facts did not bring the case within the exception in s. 5 of the Partnership Act, 1890, s. 4 of the Statute of Frauds afforded a defence, and W. W. Mear was entitled to have the action dismissed.

CROFT COTTAGE, Jaycroft Road, Burnham-on-Sea, belonged to two brothers, Samuel C. Mear and Walter W. Mear jointly, who for some years carried on business in partnership as jobbing and speculating builders, buying land, building on it, and then letting or selling it. Early in 1918, Samuel Mear being minded to sell Croft Cottage, his wife called on Thomas Cox, a land agent, and instructed him to sell for 500*l.* clear of commission, and subsequently Samuel Mear called on Cox, who told him he had a purchaser who he thought would buy for 500*l.*, and thereupon Samuel Mear definitely instructed him to sell for 500*l.* clear of his commission. Acting on those instructions Cox signed a contract for sale to the plaintiff for 515*l.* The contract, a printed document, was as follows:—

"Memorandum of agreement made and entered into this 17th day of December, 1918, whereby Thomas Cox agent for S. C. Mear (hereinafter called the vendor) agrees to sell Robert John Kelway Keen of the Chestnuts Mear (hereinafter called the purchaser) agrees to purchase All that freehold house and premises in Jaycroft Road Burnham-on-Sea and called and known as Croft Cottage for the sum of Five Hundred and Fifteen pounds of which a deposit of 50*l.* shall be paid to Thomas Cox of The Mart Burnham-on-Sea on the signing of this agreement the receipt of which deposit is hereby acknowledged and the balance of the purchase money shall be paid and the sale completed at the offices of the vendor's solicitors on the 25th of March, 1919. A good and sufficient title shall be given to the said property and shall be the title under which the vendor purchased and the property is sold subject to the restrictive and other covenants (if any) of the building estate of which the property formed part

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and an abstract of title shall be supplied to the purchaser's solicitors.

Further conditions (if any).

The property is sold subject to the existing tenancy.

Signed by the said vendor in the presence of
E. ELLIOTT,
The Mart, Burnham-on Sea.
THOMAS COX, L.S.
Agent for vendor.

Signed by the said purchaser in the presence of
THOMAS COX,
The Mart, Burnham-on-Sea."
R. J. K. KEEN, L.S.

On January 11, 1919, Samuel Mear called on Cox, read the contract and expressed himself very pleased with the deposit, and told Cox to write to the purchaser's solicitors to say that the title deeds were at the bank and that he would prefer to complete in June rather than in March. On January 18 his wife called on Cox to try and obtain the 50*l.* deposit. Matters proceeded till February 16 when Cox received the following letter from Walter Mear :—

"16 February, 1919.

"Dear Sir,

"I have been informed by my brother that he has offered Croft Cottage for sale and there is a purchaser for the same. I can assure you that I knew nothing of this or had the least idea the property was in the market as I was not consulted about this. I do not intend to give my consent for the house to be sold. Also there was no necessity for us to sell this house. Will you kindly inform your client of my decision.

"I remain, yours faithfully,

"THOMAS COX, Esq. "W. W. MEAR."

In these circumstances the purchaser brought this action against Samuel Mear and, by amendment, Walter Mear, claiming specific performance of the contract.

Errington for the plaintiff. Samuel Mear was agent for himself and Walter Mear, and was able to bind the partnership,

Partnership Act, 1890, s. 5 (1), though it cannot be said that the plaintiff knew Samuel Mear to be a partner. [He also referred to ss. 1, 6, 8, 38.]

Beebee for the defendants. For a contract of sale to be enforceable under the Statute of Frauds it must contain a proper description of the vendor: *Jarrett* v. *Hunter* (2); *Lovesy* v. *Palmer* (3); *Saunderson* v. *Griffiths* (4); *Wylson* v. *Dunn*. (5) In this contract Cox was described as "agent for S. C. Mear (hereinafter called the vendor)," and signed it as "agent for vendor." Samuel Mear was therefore described as vendor, and now it is sought to say that there were two vendors and that Cox was agent for the two. Cox had no authority from Samuel Mear, much less from Walter Mear, to sign a contract. He assumed authority. Certainly he had none to enter into this special contract, with the obligation to make a good and sufficient title: see per Lord Finlay L.C. in *McGrory* v. *Alderdale Estate Co.* (6), even if he could enter into an open contract: *Hamer* v. *Sharp* (7); *Thuman* v. *Best* (8); *Chadburn* v. *Moore* (9); *Wilde* v. *Watson* (10); *Rosenbaum* v. *Belson*. (11) The plaintiff did not know Samuel Mear to be a partner, and the partnership is not bound under the Partnership Act, 1890, s. 5: *British Homes Assurance Corporation* v. *Paterson*. (12) He cannot be entitled to damages for loss of bargain or to anything more than return of his deposit with interest and costs of investigating title: *Bain* v. *Fothergill* (13); *Day* v. *Singleton*. (14)

(1) Partnership Act, 1890, s. 5: "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

(2) (1886) 34 Ch. D. 182.
(3) [1916] 2 Ch. 233.
(4) (1826) 5 B. & C. 909.
(5) (1887) 34 Ch. D. 569.
(6) [1918] A. C. 503, 508.
(7) L. R. 19 Eq. 108.
(8) [1907] W. N. 170.
(9) 61 L. J. (Ch.) 674.
(10) 1 L. R. Ir. 402.
(11) [1900] 2 Ch. 267.
(12) [1902] 2 Ch. 404, 411.
(13) L. R. 7 H. L. 158.
(14) [1899] 2 Ch. 320.

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Errington in reply. No question of the Statute of Frauds arises in a case to which s. 5 of the Partnership Act applies. Cox was lawfully authorized by Walter Mear through Samuel Mear. There is nothing in law which prevents a person, here Samuel Mear, who has power to act for another person (Walter Mear), from acting by an agent (Cox). There is something in the nature of an estoppel here; Walter Mear is estopped from saying he is not bound. Buying and selling land was "in the usual way of business of the kind carried on by the firm."

As to damages, *Bain* v. *Fothergill* (1) has been considerably watered down: *Day* v. *Singleton*. (2)

[RUSSELL J. Does it not come to this, that where there is good faith on the part of the vendor he cannot be made liable for damages for loss of bargain?]

Here there was not such complete good faith on the part of the vendors as to satisfy *Bain* v. *Fothergill*. (1) There need not be wilful default or bad faith: *In re Daniel*. (3) *Bain* v. *Fothergill* (1) is an anomalous case and only to be followed in the case of the special circumstances there indicated. The law of England as to the sale of land being so complicated, it may not be right in such cases to charge a vendor for being unable to carry out his contract. But here the contract was entered into by Samuel Mear recklessly and without regard to whether he could or could not carry it out. This case is different from *Bain* v. *Fothergill*. (1) *Godwin* v. *Francis* (4) is like this.

Beebee called the attention of the Court to *De Bussche* v. *Alt* (5) on the question of ratification of the contract by Samuel Mear.

Cur. adv. vult.

June 21. RUSSELL J. after stating the facts. As against Samuel Mear, the contract is a good enforceable contract entered into on his behalf by his agent. He is unable to carry it out,

(1) L. R. 7 H. L. 158.
(2) [1899] 2 Ch. 320.
(3) [1917] 2 Ch. 405.
(4) (1870) L. R. 5 C. P. 295, 306.
(5) (1878) 8 Ch. D. 286, 312.

and specific performance of it cannot be decreed because in fact he is not the sole owner of the premises and his co-owner refuses to concur. In these circumstances is he bound by the contract and liable for the breach of it? It is said on his behalf that he is not liable at all, because Cox the alleged agent had no authority to make a contract on his behalf and had certainly no authority to make this particular contract on his behalf. *Hamer* v. *Sharp* (1); *Wilde* v. *Watson* (2); *Chadburn* v. *Moore* (3); *Rosenbaum* v. *Belson* (4); and *Thuman* v. *Best* (5) were cited to me. The result of those cases is, in my opinion, this: that the mere employment by an owner of an estate agent to dispose of a house confers no authority to make a contract; the agent is solely employed to find persons to negotiate with the owner; but, if the agent is definitely instructed to sell at a defined price, those instructions involve authority to make a binding contract and to sign an agreement. In the case before me, the evidence shows that on December 14, 1918, Samuel Mear called on Cox, and Cox told him he had a purchaser who he thought would buy for 500*l.*, and that thereupon Samuel Mear definitely instructed him to sell for 500*l.* clear of Cox's commission. Acting on these instructions Cox signed a contract for the sale to the plaintiff for 515*l.* In these circumstances, Cox had, in my opinion, authority to sign an open contract on behalf of Samuel Mear to sell the property for 515*l.* But had he authority to sign the particular contract here in question? I think not. It contains a special condition as to title, which might or might not be less favourable to a vendor than the title required under an open contract: see Lord Finlay's statement of the law in *McGrory* v. *Alderdale Estate Co.* (6) It is no part of an estate agent's duty to deal with title: indeed as a rule (as was the fact in this case) the estate agent would know nothing about the title to the property which is placed in his hands for sale. Notwithstanding this, Samuel Mear became, in my opinion,

(1) L. R. 19 Eq. 108.
(2) 1 L. R. Ir. 402.
(3) 61 L. J. (Ch.) 674.
(4) [1900] 2 Ch. 267.
(5) [1907] W. N. 170.
(6) [1918] A. C. 508.

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bound by the contract because he subsequently approved of it and adopted it. Until litigation supervened he never suggested that the contract was not binding on him, and he has not been called before me to suggest that when he read the document he did not know and approve of its contents. In the circumstances I hold that he has ratified and adopted the contract entered into on his behalf by Cox and is liable for the breach of it; nor does *De Bussche* v. *Alt* (1) which was cited on behalf of the defendants affect, in my opinion, the conclusion at which I have arrived on this branch of the case.

As regards the defendant Walter Mear, he never in fact authorized the sale but repudiated it as soon as he heard of it. He relies as a defence on the Statute of Frauds. In order to render him liable, it is necessary to find an agreement or some memorandum or some note thereof in writing signed by him or some other person thereunto by him lawfully authorized. There is no agreement or memorandum signed by him or by anyone authorized by him: prima facie the Statute of Frauds affords him a complete defence. It is, however, said that this defence is answered and destroyed by reason of s. 5 of the Partnership Act, 1890. [His Lordship read the section and continued:] It is said that Samuel Mear has effectively bound himself by the contract signed by Cox to sell and convey to the plaintiff; and that this act of Samuel Mear is an act for carrying on in the usual way business of the kind carried on by the firm, which binds his partner Walter Mear. It was attempted to prove that by the practice of the partners the selling of the partnership houses was entrusted solely to Samuel Mear, but Cox's evidence on this point failed to establish the fact, and I accept Walter Mear's statement that he and his brother always agreed together as to price before any partnership house was sold and that no partnership house had ever been sold through a house agent. That statement was of course subject to the one case involved in this action. Assuming that that state of affairs does not bring the case within the exception contained in s. 5 of the

(1) 8 Ch. D. 286.

Partnership Act, I am nevertheless of opinion that the Statute of Frauds affords Walter Mear a defence. Sect. 5 of the Partnership Act was not intended to, and does not, override s. 4 of the Statute of Frauds. If Samuel Mear could bind his firm under s. 5 of the Partnership Act and there existed a memorandum signed by him, it may well be that Walter Mear could not rely on the Statute of Frauds, but all that we have here is a memorandum signed by Cox, agent for one vendor Samuel Mear. In effect the plaintiff asks me to vary the memorandum by establishing by parol evidence (*a*) the existence of two vendors, and (*b*) the name of the second vendor. That is just what the Statute of Frauds prevents me from doing. *Jarrett* v. *Hunter* (1) and *Lovesy* v. *Palmer* (2) are authorities for the proposition that a memorandum which can only be made sufficient by oral evidence is not a memorandum within the statute, and all the more so when the effect of the parol evidence would be, as here, not to supplement but to vary or contradict the statement in the memorandum that Cox was acting for a single vendor.

The result is that as against the defendant Walter Mear the plaintiff fails ; and as against the defendant Samuel Mear the plaintiff is entitled to recover some damages. The question is what damages. The purchase has gone off owing to the inability of Samuel Mear to make a title. I am satisfied that Samuel Mear acted in perfect good faith, that he considered the price satisfactory, and that he did his best to induce his brother to complete the sale. In these circumstances the case falls within the rule in *Flureau* v. *Thornhill* (3) and *Bain* v. *Fothergill.* (4) *In re Daniel* (5) was a case of a contract for sale of a property free from incumbrances by a vendor who must have known that he could not pay off a mortgage on the property sold with other property if the mortgagees refused, as in fact they did, to release the property sold from their security. It does not apply to the case before me. The plaintiff is not entitled

(1) 34 Ch. D. 182.
(2) [1916] 2 Ch. 233.
(3) 2 W. Bl. 1078.
(4) L. R. 7 H. L. 158.
(5) [1917] 2 Ch. 405.

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to damages for loss of bargain nor is he, in my opinion, entitled either (*a*) to any part of the costs of this litigation as damages or (*b*) to any interest in respect of the balance of purchase money which he placed on deposit at his bank. He is entitled to (*a*) interest at 5 per cent. on the deposit of 50*l.* from December 17, 1918, (*b*) such costs (if any) as he may have been put to in investigating title, and (*c*) a sum of 7*s.* 6*d.* which he paid to insure the property on the faith of the contract and before the contract had been repudiated by Walter Mear. As against the defendant Walter Mear the action will be dismissed.

Solicitors: *Bridges, Sawtell & Co., for Gould & Swayne, Glastonbury; Haslewood, Hare & Co., for Geo. T. Cooke, Son & Painter, Bristol.*

A. L.

SARGANT J. 1920 *June* 16, 17, 22.

WALL *v.* LONDON AND PROVINCIAL TRUST, LIMITED.

[1919. W. 737.]

Company—Debenture Stock—Redemption at a Discount—Dividend to Shareholders in respect of the Discount.

A company was incorporated as a trust investment company of the type described in *Verner* v. *General and Commercial Investment Trust* [1894] 2 Ch. 239, the objects as defined by clause 3 of its memorandum of association including (*a*) to acquire and hold stocks, shares and securities of the classes therein specified and from time to time to change such investments for others of the like nature, and (*b*) to borrow on debenture stock and to redeem or pay off any moneys so borrowed. The business and accounts of the company were conducted and kept, as required by the articles of association, on the footing that profit or loss on a change of investment was carried to capital account, and net receipts over expenditure were carried to revenue account and became available for payment of dividends without regard to any depreciation in the market value of the company's investments. In 1900 the company issued at par debenture stock. In 1918, owing to the general fall in the value of securities, the directors were enabled to redeem some of this debenture stock at a discount, and they claimed the right to carry the whole amount of this discount to revenue account. The investments forming the assets of the company had fallen to an extent approximately

equivalent to the discount at which the debenture stock had been redeemed :—

Held, (1.) that, apart from the special provisions of the articles of association, the single item of gain by redemption of debenture stock could not be dissociated from the loss of capital assets, and that the amount of the discount was not distributable as dividend ; and (2.) that the issue of loan capital was not one of the objects or part of the business of the company, but was a power to be exercised incidentally to, and in furtherance of, its objects, and that, even if the discount was otherwise divisible as net profit, such a division would be prohibited by the fact that it did not arise out of the company's business.

Decision of Younger J. in the same case [1920] 1 Ch. 45 followed.

THIS was the trial of an action in which, on June 6, 1919, Younger J., as he then was, granted an interlocutory injunction against the defendants, the above-named company and its then directors. The evidence there partly consisted of affidavits, and at the trial there was substituted for this certain oral evidence, but, as pointed out by Sargant J. in his judgment, given below, the facts proved at the trial were in no material respect different from those disclosed on the motion. The case before Younger J. is reported. (1)

The company was a trust investment company, and incorporated in 1900 under the Companies Acts, 1862 and onwards, as a company limited by shares, its objects as defined by clause 3 of its Memorandum of Association including (*a*) the acquiring and holding stocks, shares and securities of the classes therein specified and from time to time changing such investments for others of the like nature, and (*b*) the borrowing, raising or securing the payment of money in such manner as the company should think fit, and in particular by the issue of any bonds, mortgages, debentures or debenture stock of the company, perpetual or otherwise, charged upon all or any part of the company's property, both present and future, including its uncalled capital and unpaid calls, and the redeeming or paying off any moneys so borrowed, raised or secured.

The following were the material articles of association set out in the previous report of the case and referred to in the judgment of Sargant J.

(1) [1920] 1 Ch. 45.

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"123. The board may, with the sanction of the company in general meeting, from time to time declare a dividend to be paid to the members in accordance with their respective rights and interests in the profits.

"124. The board may in any year, after a dividend of 4½ per cent. has been paid on the preference stock and 4 per cent. on the ordinary stock, carry to a general reserve account for the equalisation of dividends or payment of losses such sum as they may deem expedient.

"125. No dividend, instalment of dividend, or bonus shall be payable except out of net profits arising out of the business of the company.

"126. All profits and losses resulting from any change of investments shall be carried to capital reserve account, and any such profits or losses shall be disregarded in estimating the net profits of the company. Provided, however, that on any investment which has been purchased and resold at a profit, and which has yielded a return of income not exceeding 5 per cent. per annum, the board may appropriate for revenue out of such profit such a sum or sums as will make a return on such investment equal to interest at the rate of 5 per cent. per annum."

The company issued share capital consisting, in equal aggregate amounts, of ordinary stock, and preference stock carrying a preferential 4½ per cent. dividend. It also issued, at par, 50,000 debenture stock carrying interest at 4¼ per cent. and redeemable, at the option of the company, at 115*l.* per cent.; but by agreement between the company and a stockholder debenture stock might be paid off on any other terms.

In 1918 the market price of the debenture stock was about 78*l.* per cent., and taking advantage of this fact the directors redeemed about 29,312*l.* of the stock at a discount (22*l.* per cent.) which amounted to 6255*l.* 5*s.* 2*d.* This sum they carried to a so-called revenue reserve account, and they claimed the right, if so minded, to bring all or any part thereof into current revenue, as an item of net profit of the company's business, for distribution as dividend. The securities of the

company had fallen in value to an extent approximately equivalent to the discount at which the debenture stock had been redeemed.

The plaintiff, on behalf of himself and the other preference stockholders in the company, sued the company and its directors for a declaration that it was beyond the powers of the directors, and in contravention of the articles of association, to transfer to the revenue reserve account the 6255*l.* 5*s.* 2*d.* or other sums representing the discount arising upon redemption of the company's debenture stock, alleged by the directors to be profit on the redemption, or to distribute the sum as dividend among the stockholders.

On the motion for an interlocutory injunction, Younger J. decided that clause 3 (*b*) of the memorandum of association did not authorize a separate and independent business, but was subsidiary to the main purpose in clause 3 (*a*); and that the amount of the discount at which the debenture stock had been redeemed was not net profit of the company or net profit arising from its business, and that no part of it could be distributed as dividend. (1)

The action was tried with witnesses before Sargant J. on June 16 and 17, 1920.

A. Grant K.C. and *W. F. Swords* for the plaintiff. Clause 3 (*a*) of the memorandum of association states the principal object of the company. Clause 3 (*b*), as to borrowing, is not an object or a separate business of the company, but a simple power which is only ancillary or incidental to the main object described in clause 3 (*a*). Clause 123 gives the directors, with the company's sanction, the power to declare a dividend payable to members "in accordance with their respective rights and interests in the profits." Art. 124 only enables the board, after paying fixed dividends on preference and ordinary stock, to create a reserve fund to equalise dividends and pay losses. Art. 125 says that dividends are only to be paid "out of net profits arising out of the business of the company," and the redemption of debenture stock

(1) [1920] 1 Ch. 45.

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was no business of the company. Art. 126 provides for a "capital reserve account." The effect is that there are two reserve accounts—one a capital reserve account and the other a general reserve account. The capital reserve is not to be available for payment of dividends. The company was formed on the double account system, under which the profits are the excess of revenue receipts over expenses properly chargeable to revenue account, and the capital account and revenue account are kept distinct and for the purpose of determining profits accretion to or diminution of capital are disregarded. The practice adopted in ordinary companies has no relevance here. If this company had used revenue to pay off the debenture stock, no objection could have been raised, but the stock was paid off out of capital assets produced by the sale of investments at a loss. If the debenture stock had been redeemed and transferred to trustees, it could not have been said that the discount was a profit. That would be a mere change of investment, and the effect is the same where there is cancellation of the redeemed stock. As Younger J. said (1): "The accounts are distinct. There is a gulf set between them not spanned by any bridge. You must not carry any asset from one to the other."

There is a distinction between the profits of a company and the profits of its business: *In re Spanish Prospecting Co.* (2); Buckley on the Companies Act, 9th ed., p. 652. If there was a profit here, it was not a profit of the business, for clause 3 (*b*) of the memorandum of association does not disclose an object of the company, but only gives a power which is ancillary or incidental to the object disclosed in clause 3 (*a*).

[They also referred to *Verner* v. *General and Commercial Investment Trust* (3) and the criticism of that case in Palmer's Company Precedents, 11th ed., Part I., p. 895.]

Galbraith K.C. and *W. P. Spens* for the defendants. The only point dealt with by Younger J. was whether the amount of discount could be distributed as dividend, and that depends

(1) [1920] 1 Ch. 55. (2) [1911] 1 Ch. 92, 106.
(3) [1894] 2 Ch. 239.

on the construction to be placed on art. 126. "Capital" in one sense means the assets representing the share capital of the company. The transaction in this case was not a change of investment, for the redeemed stock was not taken as a security to be reissued as an investment. The plaintiffs are relying on a state of facts which never existed. The payment of the proposed dividend would not be a payment of a dividend out of share capital; it would only be a payment out of debenture capital, which is not illegal: Buckley on the Companies Acts, 9th ed., p. 659; *Bloxam* v. *Metropolitan Ry. Co.* (1)

On the individual discount transaction there was clearly a profit, and there was no obligation on the company to pick up past losses, if they are losses, in respect of previous depreciations to the value of capital assets in the shape of investments and thereby to wipe out the profit made by the discount: *Verner* v. *General and Commercial Investment Trust* (2); *Ammonia Soda Co.* v. *Chamberlain.* (3) The lastly cited case goes far towards showing that dividends may be declared in respect of an appreciation in value of capital assets, although it does not contain an actual decision to that effect. But when that question arises, the principles laid down, perhaps in somewhat vague language, by the Court of Appeal in *In re National Bank of Wales* (4), affirmed in the House of Lords as *Dovey* v. *Cory* (5), will apply.

The discount represents not only profits of the company but also profits of its business. Clause 3 (*b*) of the memorandum of association discloses a distinct and separate object of the company and not a mere power incidental to the object stated in clause 3 (*a*).

The difficulty set up by the plaintiff is only a plausible one—namely, that the discount is still part of the capital assets. But, suppose that the company had sold some of its investments and had paid the purchase-money into a bank in cash, and had then bought up its debenture

(1) (1868) L. R. 3 Ch. 337, 350.
(2) [1894 2 Ch. 239.
(3) [1918] 1 Ch. 266.
(4) [1899] 2 Ch. 629.
(5) [1901] A. C. 477.

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stock at a discount with the result that there was a cash balance at the bank to the credit of the company, could it be contended that the cash balance could not be distributed as dividend? The discount comes out of the pockets of the debenture stockholders and not out of the coffers of the company. It is profit and not capital. It can only go to capital on one of two grounds—namely, (1.) that it is no part of an appreciation of capital value, or (2.) that it ought to be carried to a depreciation account. *Verner* v. *General and Commercial Investment Trust* (1) disperses those grounds.

[They also referred to *Trevor* v. *Whitworth* (2), *Lee* v. *Neuchatel Asphalte Co.* (3) and *In re National Bank of Wales.* (4)]

A. Grant K.C. in reply.

Cur. adv. vult.

June 22. SARGANT J. In this case Younger L.J., while a judge of first instance, has granted the plaintiff an interlocutory injunction, and in doing so has dealt with the law of the matter in a carefully considered and fully reported judgment. The plaintiff is now asking at the Bar for a judgment which will do no more than give permanent effect to the principles on which the interlocutory order was founded; and the facts proved at the hearing are in no material respect different from those disclosed on the affidavits on the motion.

In these circumstances I might well content myself with merely adopting the view of the law which has already prevailed. But, having regard to the importance of the question, and out of respect to the arguments that I have heard, I will give my own reasons for my decision.

Apart altogether from the special provisions of the defendant company's articles, I am clear that the directors could not dissociate the single item of gain now in question from the items of loss, and treat it as a profit susceptible of being divided as dividend. Before the transaction the capital of

(1) [1894] 2 Ch. 239.
(2) (1887) 12 App. Cas. 409.
(3) (1889) 41 Ch. D. 1.
(4) [1899] 2 Ch. 629.

the company was represented by certain investments charged with debenture stock; and the value both of the investments and of the debenture stock had become seriously depreciated, with the result that the value of the equity of redemption was some 30 to 40 per cent. less than the nominal amount of the issued capital of the company. Then an arrangement was made under which part of the debenture stock was paid off, at or somewhere above its depreciated value, out of some of the assets on which it was charged, some at least of these assets being realized for that purpose at their depreciated value. The net result is that the capital of the company is now represented by a less amount of investments, subject to a smaller charge of debenture stock, and that substantially the same proportion of the issued capital is still unrepresented by available assets.

This state of circumstances is one which might justify a petition for a reduction of capital, but it seems wholly inappropriate for rendering divisible as profit an item of gain representing a reduction in liability, which has been wiped out over and over again by previous or simultaneous losses in respect of the assets charged with the liability. Profit for this purpose is not constituted by one individual gain, but by a surplus of gains of all kinds over losses of all kinds during some definite period.

Even if the appropriate period here were not the life of the company, but were limited to the two years 1917 and 1919, in which the arrangement in question took place, or to either of those two years, I cannot find anything to indicate a profit to the extent of the 6255*l.* 5*s.* 2*d.*, or of any part thereof. If it is necessary for the purposes of my decision, I am clear that the gain involved in the reduction of the liability on the debenture stock was a gain in respect of capital or on capital account, and was analogous to the losses on capital account caused by the depreciation of the investments which were held by the company and were charged by the debenture stock. I dissent altogether from that part of the defendants' argument which sought for the purposes of this case to differentiate a loss or gain in respect of assets representing

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capital raised by loans from a loss or gain in respect of assets representing capital raised by the issue of share capital. The source from which the purchase was made of the now depreciated assets is, in my view, quite immaterial; the result of the loss or gain on the balance sheet of the company is the same in the one case as in the other.

Then, is there any difference made here by the special provisions in the articles of association of the company, assuming, which I doubt, that these special provisions could authorize what has been proposed? These provisions and their consequences have been very fully dealt with by Younger J., and there is no occasion to repeat the process. I will only say that, in my judgment, such difference as there is increases, rather than diminishes, the objection to the course proposed, and to some slight extent carried out, by the directors of the defendant company. The special provisions tend to accentuate the distinction between capital and income, and to prevent an item of capital gain such as this from being transferred to the credit of revenue, even if it could be segregated and dissociated from the previous and contemporaneous capital losses of the company.

I further agree with Younger J. in holding that the issue of loan capital is not, properly speaking, one of the objects or part of the business of the company, but is a power to be exercised incidentally to, and in furtherance of, the objects of the company, and that—even if the sum in question were otherwise divisible as net profits—such a division would be prohibited by the fact that it did not arise out of the business of the company.

I propose, therefore, to make a declaration, and grant an injunction substantially in accordance with heads (1.) and (2.) of the claim in the statement of claim, but I think it better to limit the terms of the declaration and the injunction rather more narrowly than is proposed in these two heads. I do not wish to decide that, in no circumstances whatever (such as, for example, the possible though extremely improbable event of an appreciation of the capital assets of the company so as to exceed the nominal value of their issued capital)

would it be possible to treat as profit and divide as dividend a gain of this nature, especially if an alteration should be made in the regulations of the defendant company.

The declaration and injunction I propose to grant will be in these terms: A declaration that the sum of 6255*l.* 5*s.* 2*d.*, in the pleadings mentioned, was not, nor was any part thereof, available for distribution as dividend, or for transfer to any account called revenue reserve account, or otherwise so designated as to imply that the said sum or any part thereof was so available; an injunction to restrain the defendant company and its directors for the time being from distributing the said sum or any part thereof as dividend, and from transferring or keeping transferred the said sum or any part thereof to the credit of any such account as aforesaid.

The company must pay the costs of the action.

Solicitors for plaintiff: *Evans, Jarvis & Sherry.*

Solicitors for defendants: *Baker, Blaker & Hawes.*

F. E.

END OF VOL. II.

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